TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 136.

MONTELLO SALT COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF UTAH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

FILED JANUARY 18, 1909.

(21,481.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 7, 1910.

a In the Supreme Court of the State of Utah.

THE STATE OF UTAH, Respondent,
v.
THE MONTELLO SALT COMPANY, a Corporation, Appellant.

Transcript on Appeal.

MAGINNIS & CORN,
Attorneys for Appellant.
M. A. BREEDEN,
A. R. BARNES, AND
W. D. RITER,
Attorneys for Respondent.

Filed July 1, 1908.
H. W. GRIFFITH,
Clerk Supreme Court of Utah.

1 In the District Court of the Third Judicial District of the State of Utah, County of Tooele.

THE STATE OF UTAH, Plaintiff,
v.
THE MONTELLO SALT COMPANY, a Corporation, Defendant.

Complaint.

The plaintiff, the State of Utah, complains and alleges:

1. That the defendant is and was at all times hereinafter set forth, a corporation duly incorporated under and by virtue of the laws of the State of Utah.

2. That under the provisions of section 8 of the Enabling Act of the United States Congress enabling the territory of Utah to enter the Union as a State, approved July 16th, 1894, the title to all the saline lands in the State of Utah became vested in said plaintiff, the State of Utah, upon its admission to the Union, and that the said State is and at all times hereinafter stated was and still is the owner in fee and entitled to the possession of all of said lands in the said State of Utah.

3. That all the following described lands are saline lands as designated by the foregoing act of congress, to-wit:

The following described real estate situate in the western part of Tooele County, Utah, about seven (7) miles east of the Nevada State line, on the Great American Desert, and beginning at a point about ¼ of a mile north by west of a certain section house at a station called Saldora, on the Western Pacific Railroad. The
2 said point being marked by a stake 4 inches by 4 inches, and standing four feet out of the ground, and being marked

stake No. 2 Journal. The said section house being located upon a certain placer claim of 160 acres, known and called as the Journal, filed for record in the office of the county recorder of Tooele County, Utah, in accordance with the laws of the United States; and running thence in a westerly direction one mile and a half, more or less, along the south line of placer claims named Hornet, Northern Star and Blue Jacket, as the same are shown of record in the recorder's office of the county recorder of Tooele County, Utah, to a point marked by a stake 4 inches by 4 inches and four feet high, which is marked stake No. 1, Blue Jay; thence in a northerly direction ½ mile, more or less, along the west line of the said Blue Jacket placer claim, to a point marked by three stakes, of said size: 1 marked stake No. 2, Blue Jacket, one marked Stake No. 1, Old Timer, and one marked stake No. 4 Cooley No. 2; thence in a westerly direction 1 mile, more or less, to a stake marked State No. 1, Robert placer mining claim as shown in said records; thence in a northerly direction ½ mile, more or less, to a stake of the same size marked stake No. 2, Robert; thence in an easterly direction ½ mile, more or less, to a point marked by three stakes of the said size, one marked stake No. 3 Robert, one marked stake No. 1 Eileen, and one marked stake No. 2, Cooley No. 2; thence in a northerly direction ½ mile, more or less, to a stake marked State No. 2, Eileen; thence in an easterly direction ½ mile more or less to a stake marked State No. 3, Eileen; thence in a northerly direction to a point marked by three stakes; one stake No. 3 Eileen, one stake No. 2, Hardstruggle Mine, and one stake No. 1, the White Salt Mine; thence in a northerly direction 1½ miles more or less along the west line of the following placer claims recorded as aforesaid: The White Salt Mine, Gem No. 3, to a stake of the same size marked Stake No. 2, Gem No. 5, 3 thence in an easterly direction ½ mile, more or less, to a point marked by three stakes of the same size, one marked stake No. 2, Gem No. 5, one marked stake No. 2, Homestake, and one marked stake No. 1, Holy Terror; thence in a northerly direction 1½ miles, more or less, along the western line of the following placer claims as recorded in the office of the county recorder as aforesaid: Holy Terror, Gem No. 6, and Ajax No. 1, to a point marked stake No. 2, Ajax No. 1; thence in an easterly direction ½ mile, more or less, to a point marked by three stakes: one stake No. 3, Ajax No. 1, one stake No. 2 Ajax No. 2, and one stake No. 1 Ajax No. 5; thence in a northerly direction ½ mile more or less to a stake marked Stake No. 2, Ajax No. 5; thence in an easterly direction 1 mile, more or less, along the north line of placer claims Ajax No. 5, and Ajax No. 4, to a point marked by a stake marked State No. 3, Ajax No. 4; thence in a southerly direction 1 mile more or less, along the east line of placer claims Ajax No. 4, Ajax No. 3, to a point marked by three stakes, one Stake No. 4, Ajax No. 3; one stake No. 3, Gem No. 2, and one stake No. 2 I. X. L. No. 4; thence in an easterly direction 1 mile, more or less, along the north line of placer claims I. X. L. No. 4, and Dan Malone, to a stake marked Stake No. 3, Dan Malone; thence in a southerly direction 4 miles, more or less, along the eastern line of the following placer claims,

Dan Malone, Sweet William, Ruby King, Jerry Dunn, Lily No. 3, Lily No. 4, Dixie Queen, and Mormon Favorite, in the latter claim crossing the line of the Western Pacific Railroad Company to a point marked by three stakes, and being about one mile and one-half east of the starting point; said stakes being marked Stake No. 4, Mormon Favorite, Stake No. 3, Big Four, and State No. 2 Pilot's Peak; thence in an easterly direction 1 mile, more or less, along the north line of placer claims Pilot's peak, and Gold Bug, to a point marked by a stake marked Stake No. 3, Gold Bug; thence in
4 a southerly direction 3½ miles, more or less, along the east line of placer claims Gold Bug, Lily No. 2, Old Bourbon, Panhandle Pete; Jessie, Eddie, and Cooley No. 1, to a point marked Stake No. 4, Cooley No. 1; thence in a westerly direction 2 miles and a half, more or less, along the south line of the following placer claims Cooley No. 1, Goody, Oreil, Rhea and Margaret No. 1, to a point marked by three stakes, one marked Stake No. 1, Margaret, one marked Stake No. 4, Floyd, and one marked Stake No. 3, Maine; thence in a southerly direction three miles and one half, more or less, along the east line of the following placer claims, Maine, Effie, McBean, Martin, Robin Hood No. 4, Robin Hood No. 5 and Vesta, to a point marked by a stake marked State No. 4, Vesta; thence in a westerly direction 4½ miles more or less along the south line of the following named placer claims, Vesta, Australia, Pickett, Tin Horn, Taliffero, Evelyn, East Lynne, and Felt, to a point marked by a stake marked State No. 1, Felt; thence in a northerly direction 5 miles, more or less, along the western line of the following placer claims, Felt, Biddle No. 2, Susan, Gladys, Bate, Hoppe No. 2, Custer, Burley, Kroll and Buster Brown, to a point marked by a stake marked Stake No. 2 Buster Brown; thence in an easterly direction ½ miles, more or less, to a point marked by three stakes, one marked stake No. 3, Buster Brown, one marked stake No. 2, Campaign, and one marked Stake No. 1 Terrace; thence in a northerly direction ½ miles, more or less, to a point marked by a stake marked stake No. 2, Terrace; thence in an easterly direction 2 miles more or less along the north line of the following named placer claims, Terrace, Fairyburg, Larose and Buzz, to a point marked stake No. 3, Buzz; thence in a southerly direction along the east line of placer claims Buzz and Orville, 1 mile, more or less, to a point marked by three stakes, one marked stake No. 4, Orville, one marked stake No. 3, Greyhound, and one marked Stake No. 2, the Grader; thence in an easterly direction alone the north line of placer claims, the Grader and
5 Fearless Dan, to a point marked by three stakes, one marked Stake No. 3, Fearless Dan, one marked Stake No. 2, Russell, and one marked Stake No. 1, Young Hyson; thence in a northerly direction along the western line of placer claims Young Hyson and Elko; 1 mile more or less, to a stake marked Stake No. 2, Elko; thence in an easterly direction ½ mile, more or less to a point marked by three stakes, one marked Stake No. 3, Elko, one marked Stake No. 2, Sharp, and one marked Stake No. 1, Fisher No. 3, thence in a northerly direction ½ mile, more or less, to a point marked by stakes marked Stake No. 2, Fisher, No. 3; thence in an

easterly direction ½ mile more or less, to a point marked by three stakes, one marked Stake No. 3, Fisher, one marked Stake No. 2, Fisher No. 2, and one marked Stake No. 1, Hogan; thence in a northerly direction along the west line of placer claims Hogan and Journal, 1 mile, more or less, crossing the Western Pacific Railroad tracks, to the place of beginning.

All of which are situate in Tooele County, State of Utah.

4. That the said defendant has taken possession of said lands and claims title thereto under certain placer mining locations heretofore made upon said lands, and the said defendant is now threatening and will, if not restrained by the order of this court, explore, dig up, destroy and remove from said lands the valuable deposits of salt thereon, and will commit other wrongs to the irreparable damage of the said plaintiff.

Wherefore plaintiff prays judgment, that the defendant be adjudged to have no right, title or interest in or to the said lands or any part thereof, and that the plaintiff, the State of Utah, be decreed to be the owner of the said saline lands above described, and the whole thereof; and that the defendant, its officers, agents, employés and servants be restrained and enjoined from in any manner entering upon, exploring, digging up, destroying or removing from
6 said lands any salt, mineral deposits or other things attached to or pertaining to said lands pending the trial of this action, and permanently, upon the final decree herein, from in any manner interfering with or entering upon or digging up or removing any deposits of salt or other things pertaining to said lands, and for costs, and for all further relief as may seem meet and just.

M. A. BREEDEN,
A. R. BARNES, AND
W. D. RITER,
Attorneys for Plaintiff.

STATE OF UTAH,
County of Salt Lake, ss:

Thomas C. Callister, being first duly sworn, deposes and says: That he is the duly elected and qualified secretary of the State Board of Land Commissioners for the State of Utah; that he is the agent of the State of Utah, the plaintiff in the above entitled action; that he makes this verification for and on behalf of the State of Utah, the plaintiff herein; that he has read the above and foregoing complaint, and knows the contents thereof, that the same is true of his own knowledge, except those matters therein stated on information and belief, and as to those matters he believes it to be true.

THOMAS C. CALLISTER.

Subscribed and sworn to before me this 11th day of October, 1907.
[SEAL.] DYKE WALTON,
Notary Public.

My commission expires —.

7 In the District Court of the Third Judicial District, State of Utah, Tooele County.

THE STATE OF UTAH, Plaintiff,
v.
THE MONTELLO SALT COMPANY, a Corporation, Defendant.

Order to Show Cause.

On reading and filing the complaint of the State of Utah in the above entitled cause, duly verified, which is hereto attached, It is Ordered that the said defendant show cause, if any it has, before this court, at the city of Tooele, on the 11th day of November, 1907, at the hour of ten o'clock A. M. on said day, or as soon thereafter as counsel can be heard, why an injunction should not be issued restraining the defendant, its officers, agents, employees, and servants, from in any manner entering upon, exploring, digging up, destroying or removing from the lands described in the said complaint, any salt, mineral deposits or other things attached to or pertaining to said lands, and for such other and further relief as may be just.

And it is further ordered that said defendant, its officers, agents and employees and servants be in the meantime restrained and the said defendant is, and each of its officers, agents, employees and servants are hereby forbidden to suffer or commit any of said acts until the further order of the court. Dated October 10th, 1907.

By the court:

T. D. LEWIS, *Judge*.

Marked on back: Filed Oct. 15, 1907. Ivor Ajax, Clerk.

8 In the District Court of the Third Judicial District of the State of Utah, in and for the County of Tooele.

STATE OF UTAH, Plaintiff,
v.
MONTELLO SALT COMPANY, Defendant.

Answer.

Now comes the defendant, and for answer to the complaint herein:

I. Admits that all of the lands described in paragraph 3, of the complaint, herein, are saline lands located within the county of Tooele, State of Utah.

II. It alleges that it is the equitable owner of said lands under and by virtue of certain conveyances from the original owners thereof, being about 1500 in number, and, therefore, too numerous to mention herein; but the defendant alleges that each and all of said numerous persons were and are citizens of the United States, and as such entitled, under the laws of the United States to locate and enter placer mineral claims under said laws, including saline lands. And

defendant further alleges that all of the lands described in said paragraph 3 were located and entered by the said persons as follows: Each of said persons through their agents on or about December 1st, 1906, in groups of eight entered upon 160 acres of said lands, discovered salt thereon, and caused the same to be distinctly marked upon the ground so that the boundaries of the said 160 acres could be readily traced and described the same by reference to a well defined monument, and posted upon the same in a conspicuous place a notice of location containing the name of the claim, the date of location, the boundaries of the claims, with reference to a well defined monument, amount of ground claimed, and that the
9 same was placer ground, and signed with the names of the locators; and that thereafter, and within 90 days they caused copies of the said notice of location to be recorded in the office of the recorder within and for Tooele County, Utah, and defendant further says that thereafter and for the purposes of more economically developing the said properties the said locators by a quit-claim deed, conveyed the said interest to this defendant and became stockholders of this defendant.

And defendant further says that at the time of the beginning of this suit, for the purpose of complying with the laws of the United States, in relation to placer claims it was about to and does threaten to enter upon the said land, and mine and remove the salt therefrom, and will unless this court forbid the same do so at the earliest possible moment.

III. Defendant further says that on the 16th day of July, 1894, the lands hereinbefore referred to and described in paragraph 3 of the complaint herein were not known to be saline, and were so covered with soil and other earthy substances that their true character was concealed, and that the same were not for a long time thereafter until, to-wit: about November 1st, 1906, discovered to be lands of a saline character. Whereas in truth and fact under such earthy substance and soil the said lands are covered by a deposit of salt varying from four to eight feet in thickness.

IV. Defendant further says as a defense herein that prior to the said discovery of the said character of said lands, which lands are only valuable for their saline deposits, the plaintiff in this case, The State of Utah, had already selected and received grants from the United States, the full amount of 110,000 acres of land selected and located as provided in sections 7 & 8 of the Enabling Act of Congress, and that therefore the land grant made by the United States for the use of the University of Utah had been heretofore satisfied;
10 and defendant further avers that at the time of the passage of said enabling act, only — acres had been classified by the Surveyor General of the United States within and for the then Territory of Utah, as saline lands, and that the said amount was in contemplation by Congress when it passed said enabling act, and that the same was duly approved.

V. Defendant denies all the allegations of paragraph 2 of said complaint.

VI. Defendant alleges that all the lands mentioned and described

in plaintiff's complaint are lands of the United States and prior to said locations by defendant's grantors, were subject to location under the placer laws of the United States as saline lands.

Wherefore, your defendant asks that it may go hence with its costs.

MAGINNIS & CORN,
Attorneys for Defendant.

STATE OF UTAH,
County of Weber, ss:

S. T. Corn being duly sworn, deposes and says, that he is one of the directors of the defendant company in the above entitled action; that he has read the above and foregoing answer and knows the contents thereof, that the same is true of his own knowledge, except as to matters therein stated on his information and belief, and as to those matters, that he believes it to be true.

S. T. CORN.

Subscribed and sworn to before me this 19th day of November, 1907.

[SEAL.] J. H. DE VINE,
Notary Public in and for Weber County.

11 *Minute Order.*

MONDAY, *February* 17, 1908.

THE STATE OF UTAH
v.
THE MONTELLO SALT COMPANY.

Continued to February 24, 1908.

Pursuant to stipulation herein, it is ordered that the within cause, coming on now regularly for trial, be and the same is hereby continued to Monday, February 24th 1908.

Minute Book "B," page 572.

12 In the District Court of the Third Judicial District of the State of Utah, in and for the County of Tooele.

STATE OF UTAH, Plaintiff,
v.
MONTELLO SALT COMPANY, Defendant.

Demurrer.

Now comes the plaintiff herein, and demurs to defendant's answer, upon the following grounds: Said answer does not state facts sufficient to constitute a defense.

Wherefore it is prayed that the plaintiff's demurrer be allowed.

M. A. BREEDEN AND
W. D. RITER,
Attorneys for Plaintiff.

Marked: Filed Mar. 1, 1908. Ivor Ajax, Clerk District Court, Tooele.

13 *Minute Order.*

FRIDAY, May 15, 1908.

No. 625.

THE STATE OF UTAH
v.
MONTELLO SALT COMPANY.

Demurrer to Answer Sustained.

For good and sufficient reason appearing to the court, it is ordered that plaintiff's demurrer to defendant's answer herein be, and the same is hereby sustained.

Minute Book "B", page 598.

14 In the District Court of the Third Judicial District, in and for the County of Tooele, State of Utah.

STATE OF UTAH, Plaintiff,
v.
MONTELLO SALT COMPANY, a Corporation, Defendant.

Judgment.

This cause coming on to be heard upon the verified complaint, and it appearing to the court that heretofore a general demurrer has been sustained to the answer herein, and the defendant refusing to plead further,

It is Ordered, Adjudged and Decreed, findings of fact and conclusions of law being waived, that the plaintiff herein, the State of Utah, is the owner in fee of the following described real estate consisting of certain saline lands as set out and described in the complaint filed in this action, and the title thereof is hereby quieted in the said plaintiff, the State of Utah, to-wit:

The following described real estate situate in the western part of Tooele County, Utah, about seven (7) miles east of the Nevada State line, on the great American Desert, and beginning at a point about ¼ of a mile north by west of a certain Section House at a station called Saldora, on the Western Pacific Railroad. The said point being marked by a stake 4 inches by 4 inches, and standing four feet out of the ground, and being marked State No. 2 Journal.

The said Section House being located upon a certain placer
15 claim of 160 acres, known and called as the Journal, filed for record in the office of the County Recorder of Tooele County, Utah, in accordance with the laws of the United States; and running thence in a Westerly direction One mile and a half, more or less, along the south line of placer claims named Hornet No. 1, Northern Star and Blue Jacket, as the same are shown of record in the Recorder's office of the County Recorder of Tooele County, Utah, to a point marked by a stake 4 inches by 4 inches and 4 feet high, which is marked stake No. 1, Blue Jay; thence in a Northerly direction ½ mile, more or less, along the West line of the said Blue Jacket Placer Claim, to a point marked by three stakes, of said size: 1 marked Stake No. 2 Blue Jacket, one marked Stake No. 1 Old Timer, and one marked Stake No. 4 Cooley No. 2; thence in a Westerly direction 1 mile, more or less, to a stake marked Stake No. 1 Robert placer mining claim as shown in said records; thence in a Northerly direction ½ mile, more or less, to a stake of the same size marked Stake No. 2, Robert; thence in an Easterly direction ½ mile, more or less, to a point marked by three stakes of the said size, one marked Stake No. 3 Robert, one marked Stake No. 1 Eileen, and one marked Stake No. 2, Cooley No. 2; thence in a Northerly direction ½ mile, more or less, to a stake marked Stake No. 2, Eileen; thence in an Easterly direction ½ mile more or less to a stake marked Stake No. 3, Eileen; thence in a Northerly direction to a point marked by three stakes; one Stake No. 3 Eileen, one Stake No. 2, Hardstruggle Mine and one Stake No. 1, The White Salt Mine; thence in a Northerly direction 1½ miles more or less along the west line of the following placer claims recorded as aforesaid: The White Salt Mine, Gem No. 3, to a stake of the same size, marked Stake No. 2, Gem No. 5; thence in an Easterly direction ½ mile, more or less, to a point marked by three stakes of the same
16 size; One marked Stake No. 3, Gem No. 5, one marked Stake No. 2, Homestake, and one marked Stake No. 1 Holy Terror; thence in a Northerly direction 1½ miles, more or less, along the Western line of the following placer claims, as recorded in the office of the County Recorder aforesaid; Holy Terror, Gem No. 6, and Ajax No. 1, to a point marked Stake No. 2, Ajax No. 1; thence in an Easterly direction ½ mile more or less, to a point marked by three stakes; one Stake No. 3, Ajax No. 1, one Stake No. 2, Ajax No. 2, and one Stake No. 1, Ajax No. 5; thence in a Northerly direction ½ mile more or less to a stake marked Stake No. 2, Ajax No. 5; thence in an Easterly direction 1 mile, more or less, along the North line of placer claims Alax No. 5 and Ajax No. 4, to a point marked by a stake marked Stake No. 3, Ajax No. 4, thence in a Southerly direction 1 mile more or less, along the East line of placer claims Ajax No. 4, Ajax No. 3, to a point marked by three stakes one, Stake No. 4, Ajax No. 3, one Stake No. 3, Gem No. 2, and one Stake No. 2 IXL No. 4; thence in an Easterly direction 1 mile more or less, along the North line of placer claims IXL No. 4, and Dan Malone, to a stake marked Stake No. 3, Dan Malone; thence in a Southerly direction 4 miles more or less, along the eastern line of the follow-

ing placer claims; Dan Malone, Sweet William, Ruby King, Jerry Dunn, Lily No. 3, Lily No. 4, Dixie Queen, and Mormon Favorite, in the latter claim crossing the line of the Western Pacific Railroad Company to a point marked by three stakes, and being about 1 mile and ½ East of the starting point; said Stakes being marked Stake No. 4, Mormon Favorite, Stake No. 3, Big Four, and Stake No. 2, Pilot's Peak; thence in an Easterly direction 1 mile, more or less, along the North line of placer claims Pilot's Peak, and Gold Bug, to a point marked by a stake marked Stake No. 3, Gold Bug; thence in a Southerly direction 3½ miles, more or less, along the East line of placer claims Gold Bug, Lily No. 2, Old Bourbon,
17 Panhandle Pete, Jessie, Eddie, and Cooley No. 1, to a point marked Stake No. 4, Cooley No. 1; thence in a Westerly direction 2 miles and a half, more or less, along the South line of the following placer claims, Cooley No. 1, Goody, Oriel, Rhea and Margaret No. 1, to a point marked by three stakes, one marked Stake No. 1, Margaret No. 1, one marked Stake No. 4, Floyd, and one marked Stake No. 3, Maine; thence in a Southerly direction three miles and one half, more or less, along the East line of the following placer claims, Maine, Effiie, McBean, Martin, Robin Hood No. 4, Robin Hood No. 5, and Vesta, to a point marked by a stake marked Stake No. 4, Vesta; thence in a Westerly direction 4½ miles more or less along the South line of the following named placer claims, Vesta, Australia, Pickett, Ten Horn, Taliferro, Evelyn, East Lynne, and Felt, to a point marked by a stake marked Stake No. 1, Felt; thence in a Northerly direction 5 miles, more or less, along the Western line of the following placer claims, Felt, Biddle No. 2, Susan, Gladys, Bate, Hoppie No. 2, Custer, Burley, Kroll and Buster Brown, to a point marked by a stake marked Stake No. 2, Buster Brown; thence in an Easterly direction ½ mile or more or less to a point marked by three stakes, one marked Stake No. 3, Buster Brown, one marked Stake No. 2, Campaign, and one marked Stake No. 1, Terrace; thence in a Northerly direction ½ mile, more or less, to a point marked by a stake marked Stake No. 2, Terrace; thence in an Easterly direction 2 miles more or less along the North line of the following named placer claims, Terrace, Fairyburg, La Rose and Buzz, to a point marked Stake No. 3, Buzz; thence in a Southerly direction along the East line of placer claims Buzz and Orville, 1 mile, more or less, to a point marked by three stakes, one marked Stake No. 4, Orville, one marked Stake No. 3, Greyhound and one marked Stake No. 2, the Grader; thence in an East-
18 erly direction along the North line of placer claims, The Grader and Fearless Dan, to a point marked by three stakes, one marked Stake No. 3, Fearless Dan, one marked Stake No. 2, Russell, and one marked Stake No. 1, Young Hyson; thence in a Northerly direction along the Western line of placer claims Young Hyson and Elko, 1 mile, more or less, to a stake marked Stake No. 2, Elko; thence in an Easterly direction ½ mile more or less to a point marked by three stakes, one marked Stake No. 3, Elko, one marked Stake No. 2, Sharp, and one marked Stake No. 1, Fisher No. 3, thence in a Northerly direction ½ mile more or less to a

point marked by stakes marked Stake No. 2, Fisher No. 3; thence in an Easterly direction ½ mile, more or less, to a point marked by three stakes, one marked Stake No. 3, Fisher, one marked Stake No. 2, Fisher No. 2, and one marked Stake No. 1, Hogan; thence in a Northerly direction along the West line of placer claims Hogan and Journal 1 mile more or less, crossing the Western Pacific Railroad tracks, to the place of beginning; all of which are situate in Tooele County, State of Utah; and that the defendant be, and it is hereby perpetually enjoined from removing from the premises described in the complaint, any salt or other valuable mineral under or by virtue of any placer locations set forth in the answer heretofore filed, and that the plaintiff do have and recover from the defendant its costs taxed at $12.50.

GEO. G. ARMSTRONG, *Judge.*

Dated June 8th, 1908.

Endorsed: Filed June 8, 1908. Ivor Ajax, clerk 3rd Dist. Court Tooele, Utah. Recorded in Judgment Book "B" pp. 288-290.

19 In the District Court of the Third Judicial District of the State of Utah in and for Tooele County.

STATE OF UTAH, Plaintiff,
v.
MONTELLO SALT COMPANY, Defendant.

Notice of Appeal.

To the clerk of said District Court, the plaintiff, and its attorneys, M. A. Breeden, Attorney General, and W. D. Riter:

Please take notice that the defendant in the above entitled action hereby appeals to the Supreme Court of this State from the judgment and decree herein made and entered in the said district court on the 8th day of June, 1908, in favor of the plaintiff in said action, and against said defendant, and from the whole thereof.

W. L. MAGINNIS,
S. T. CORN, AND
J. N. KIMBALL,
Attorneys for Defendant.

STATE OF UTAH,
County of Weber, ss:

S. A. Maginnis, being first duly sworn, says as follows: That he is a clerk in the law office of W. L. Maginnis; that he served the hereto attached notice of appeal in the above entitled action by enclosing a copy of the same in a letter addressed to Hon. M. A.
20 Breeden, Salt Lake City, Utah, and deposited the same in the post-office at Ogden City, Utah, on the 13th day of June 1908.

S. A. MAGINNIS.

Subscribed and sworn to before me this 13th day of June, 1908.

[SEAL.] J. H. DE VINE,
Notary Public.

Endorsed on Back: Filed June 15, 1908. Ivor Ajax, Clerk. Tooele, Utah.

21 In the District Court of the Third Judicial District of the State of Utah in and for Tooele County.

THE STATE OF UTAH
v.
THE MONTELLO SALT COMPANY, a Corporation.

Certificate.

I, Ivor Ajax, clerk of the foregoing entitled court do hereby certify that the files herewith constitute the original judgment roll in the foregoing entitled case, and a correct transcript of all orders that appear of record in the said case, as shown from the records of said court, and that they are hereby transmitted to the Supreme Court of the State of Utah pursuant to the Notice of Appeal herewith attached. I hereby further certify that an undertaking on appeal, in due form, in the sum of three hundred dollars has been duly and regularly filed herein.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 19th day of June, A. D. 1908.

[SEAL.] IVOR AJAX,
Clerk 3rd Dist. Court, Tooele, Utah.

22 In the Supreme Court of the State of Utah.

Regular *Regular* October Term, October 13, 1908.

THE STATE OF UTAH, Respondent,
v.
MONTELLO SALT COMPANY, a Corporation, Appellant.

Submission.

This cause coming on regularly for hearing was argued by Hon. W. L. Maginnis, S. T. Corn and J. N. Kimball in behalf of appellant; by W. D. Riter in reply, was submitted, and by the court taken under advisement.

23 In the Supreme Court of the State of Utah.

Regular October Term, November 27, 1908.

THE STATE OF UTAH, Respondent,
v.
THE MONTELLO SALT COMPANY, a Corporation, Appellant.

Judgment.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged, that the judgment of the court below be, and the same is hereby, affirmed, with costs.

24 In the Supreme Court of the State of Utah.

THE STATE OF UTAH, Respondent,
v.
MONTELLO SALT COMPANY.

STRAUP, *J.:*

It is alleged in the complaint that the plaintiff, The State of Utah, is the owner in fee and entitled to the possession of certain lands (fully described) situate in Tooele County, State of Utah; that the lands are saline lands, and were granted to the plaintiff by the government of the United States under the provisions of section 8 of the Enabling Act, enabling the Territory of Utah to enter the Union as a State; and that the defendant has wrongfully entered upon the lands, and has threatened to and will, unless restrained, remove therefrom valuable deposits of salt, to the irreparable damage of plaintiff. Judgment was demanded that the plaintiff be decreed the owner of and entitled to the possession of the lands, and that the defendant be restrained from entering upon them or from removing salt or other deposits therefrom. The defendant answered admitting that the lands are valuable only for the saline deposits found upon them and alleging that underneath the soil the lands are covered with a deposit of salt varying from four to eight feet in thickness; that at the time of the approval of the enabling act the lands were so covered with soil and other earthy substances as to conceal their true character, and that their real character was not discovered until November 1908; that the plaintiff had selected and
25 located and received grants to the full amount of the 110,000 acres of lands granted it under section 8 of the Enabling Act for University purposes, and that the lands in question were not included in the selection or location so made by the state of Utah; that the legal title of the lands in question was in the government of the United States, and that the defendant was the equitable owner and entitled to the possession thereof by virtue of locations made by its grantors as saline lands under the placer laws of the United

States. The court sustained plaintiff's demurrer to the answer. The defendant declined to further answer or plead. Judgment was therefore entered in favor of the plaintiff as prayed for in the complaint, from which the defendant has prosecuted this appeal.

Counsel for both parties assert that the controversy arises over and the determination of the question wholly depends upon the construction to be given Section 8 of the enabling act. The section is as follows:

"That lands to the extent of two townships in quantity, authorized by the third section of the act of February twenty-one, eighteen hundred and fifty-five, to be reserved for the establishment of the University of Utah, are hereby granted to the state of Utah for university purposes, to be held and used in accordance with the provisions of this section; and any portion of said lands that may not have been selected by said territory may be selected by said state. That in addition to the above, one hundred and ten thousand acres of land, to be selected and located as provided in the foregoing section of this act, and including all the saline lands in said state, are hereby granted to said state, for the use of said university, and two hundred thousand acres for the use of an agricultural college therein. That the proceed- of the sale of said lands, or any portion thereof, shall constitute permanent funds, to be safely invested and held by said state, and the income thereof to be used exclusively for the purposes of such university and agricultural college, respectively."

The essential difference between the parties as to the meaning to be given this section arises over the clause, "That in addition to the above, one hundred and ten thousand acres of land to be selected and located as provided in the foregoing section of this act, and including all saline lands in said state. The appellant contends that
26 the additional lands granted in that clause for the use of the university is, only one hundred and ten thousand acres of lands, and that whatever saline lands are claimed by the state must be selected and located by it and embraced within the one hundred and ten thousand acres of lands; and that in as much as the state had already selected and located one hundred and ten thousand acres of lands for the use of the university, it is not entitled to the saline lands in question because they were not selected and not embraced within the one hundred and ten thousand acres of lands which had been selected and located by the state for the use of the university. On the other hand, the state contends that the additional lands granted in the clause for the use of the university are, one hundred and ten thousand acres to be selected and located by it, and in addition thereto, all the saline lands in the state; and in as much as all the saline lands were granted to it, no selection or location of them was necessary.

It may be said at the outset that the grant "should be neither enlarged by ingenious meaning, nor diminished by strained construction. The interpretation must be reasonable, and such as will give effect to the intention of Congress. This is to be ascertained from the terms employed, the situation of the parties, and the nature of the

grant. If these terms are plain and unambiguous there can be no difficulty in enforcing them; but if they admit of different meanings,—one of extention and the other of limitation,—they must be accepted in a sense favorable to the grantor. And if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them. In other words, what is not given expressly, or by necessary implication, is withheld." (Leavenworth, etc.
27 R. R. v. U. S., 92 U. S. 740.) In section 12 of the enabling act, it is also provided that "the said State of Utah shall not be entitled to any further or other grants of land for any purpose than is expressly provided in this act" etc. Conceding, therefore, that the state is entitled to only such lands as have been expressly granted to it, nevertheless the enabling act is "to be considered sensibly, and with a view to the object aimed at by the legislature." (Gibson v. Jenney, 15 Mass., 205) In determining the question the chief purpose is to ascertain the intention of Congress. Its intention is found "in the language actually used, interpreted according to its fair and obvious meaning." (U. S. v. Harris, 177 U. S. 305.) If the language employed is ambiguous, and if from the situation of the parties, and the nature of the grant, it is uncertain whether saline lands were or were not included within the one hundred and ten thousand acres of lands, "the special rule of construction applicable to statutes making such grants would compel a construction favorable to the grantor." (Barden v. N. P. R. R., 154 U. S. 321.) From a reading of the statute it appears that lands were granted to the extent of two townships, authorized by the act of 1855. In addition thereto, there were also granted "one hundred and ten thousand acres of lands to be selected and located as provided in the foregoing section of this act, and including all saline lands in said state." The question now is, and the thing which counsel assert divides them is, what meaning shall be given the words "and" and "including" found in that clause? The appellant contends that "the word 'and' just preceding the word 'including' must, as we take it, be stricken out as meaningless and serving only to obscure the meaning." It is then, in effect, urged that by disregarding the word "and" and by treating the word "including" as a word of limitation, or regarding it as expressing the idea
28 that the thing in question constitutes a part only of the contents of some other thing, the clause must be read to mean, that the saline lands are embraced within the one hundred and ten thousand acres. Were we at liberty to wholly disregard the word "and," and were we further at liberty to transpose the words in the clause as do counsel, so as to make the clause read that a further or additional grant of "one hundred and ten thousand acres of lands including all saline lands in said state, to be selected and located etc., are hereby granted," there would be some force to appellant's position. But we do not feel that we are at liberty to do either. It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. By giving effect to the word "and" does not render the clause in which it oc-

curs unintelligible nor lead to an absurdity. We, therefore, are not at liberty to reject it. Nor is the word generally regarded of a flexible character, or of a dubious or varied meaning, permitting it to be enlarged or restricted, or to be greatly varied, in order to give effect to the fundamental purpose of a statute, and to carry out the intent of the law making body. According to the common and approved usage of language, the word "and" expresses the relation of addition. We think it was used in such sense in the clause in question. The word "including" is susceptible of different shades of meaning. Common usage has given it different meanings. It may be used in the sense to comprise or embrace, as this volume includes all his works (Standard Dictionary); to confine or to contain, as the shell of a nut includes the kernel (Webster's Dictionary); to express the idea that a thing in question constitutes a part only of the contents of some other thing (Dumas v. Boulin, La. 1 McGloin, 275); as a word of enlargement, and in ordinary signification implying
29 that something else has been given beyond the general language which precedes it (In re Getz, 75 N. Y. S. 750); to add to the general clause a species which does not naturally belong to it (Hilder v. U. S. 106 Fed. 73); as the equivalent of "also" a sense in which it is frequently employed in tariff acts (U. S. v. Pierce, 147 Fed. 199.) We think the word "including" was here used as a word of enlargement, to add to, or as the equivalent of "also," and as so used, implies that something else has been given beyond the general language which precedes it. So regarding these words, in the clause in which they are found, is but giving them their ordinary and popular meaning, and is placing a construction upon them as construed and understood according to the common and approved usage of language. When so construed and understood, it is very clear that by the clause in question Congress intended to grant something in addition to the one hundred and ten thousand acres of lands for the use of the university, which is plainly expressed to be all the saline lands in the state.

Appellant has referred us to enabling acts of other states (Ohio, Missouri, Michigan, Illinois, Alabama, Mississippi and Arkansas) wherein only a definite number of salt springs of a definite quantity of saline lands was granted to the state, as evidencing a policy not to grant all, but only a portion of the salt springs or saline lands to the state. Respondent has referred us to the enabling acts of North and South Dakota, Montana, Oregon, and Wyoming, wherein it was expressly provided that the lands granted were "in lieu of any grant of saline lands granted to said state"; and has especially referred us to land grants made to the Territory of New Mexico, four years after the approval of the Utah Enabling act, wherein there was granted to the Territory of New Mexico, for university purposes, in addition to lands to the extent of two townships in quantity, "65,000
30 acres of non-mineral, unappropriated and unoccupied land, to be selected and located as hereinafter provided, together with all saline lands in said territory." These are matters worthy of but little consideration. It was entirely optional with Congress to grant Missouri twelve salt springs, or a less or a greater number;

New Mexico or Utah all, or only a part of the saline lands, within their respective boundaries. The fact that Congress granted to Missouri only a part of the salt springs within its territory, and to New Mexico all the saline lands found within its territory, can throw no light upon the meaning of the language employed in the Utah enabling act granting certain lands to it.

We are also referred to the majority and minority reports on the bill providing for the admission of the Territory of Utah as a State. Section 8 of the majority report is as it now appears in the statute. A part of section 8 of the minority report is "and that there be further appropriated one hundred and ten thousand acres of lands for the support of a university, said one hundred and ten thousand acres of land to include saline lands to an amount not to exceed three thousand acres." From this it is argued that one of the questions before Congress was, whether the grant of saline lands should be a part of and should be included in the grant of one hundred and ten thousand acres of lands, or whether the grant of saline lands should be excluded therefrom; that since the minority report in express terms included a grant of saline lands (to the extent of three thousand acres) and expressly provided that it should be a part of the one hundred and ten thousand acres of lands, and since the majority report provided for a grant of one hundred and ten thousand acres of lands, "and including all saline lands in said state," Congress, by the rejection of the minority report, and by the adoption of the majority report, evidenced an intention to grant one hundred and ten thousand acres of lands, and also all saline lands in the state.

We do not find it necessary to inquire into or consider these reports. The object of all interpretation of a statute is to determine what intention is conveyed by the language employed. If Congress has expressed its intention, in the law itself, with certainty, it is not admissible to depart from that intention on any extraneous consideration or theory of construction. The sense in which the words were intended to be used can be clearly ascertained from their context and the statute itself. We think the language employed clearly and distinctly expresses the Congressional intent, and that the statute is free from ambiguity and doubt. There is, therefore, no occasion to resort to other means of interpretation.

We are of the opinion that the judgment of the court below ought to be affirmed, with costs.

It is so ordered.

We concur:

W. M. McCARTY, *C. J.*
J. E. FRICK, *J.*

32 In the Supreme Court of the State of Utah.

THE STATE OF UTAH, Respondent,
v.
MONTELLO SALT COMPANY, Appellant.

Petition for Writ of Error.

To the Hon. William M. McCarty, Chief Justice of the Supreme Court of the State of Utah:

The Montello Salt Company respectfully petitions and shows to your honor that on or about the 27th day of November, 1908, the Supreme Court of the State of Utah entered a judgment in the above entitled action in favor of the respondent and against your petitioner and appellant, in which judgment and the proceedings had prior thereto, in said cause, certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the assignment of errors which is filed and presented with this petition.

Wherefore your petitioner prays that a writ of error may issue in this behalf to the Supreme Court of the United States of America for the correction of the errors so complained of, and that a transcript of the record and proceedings and papers in said cause, duly authenticated, may be sent to the said Supreme Court of the United States.

W. L. MAGINNIS,
JAMES N. KIMBALL,
S. T. CORN
Attorneys for Appellant, Montello Salt Company.

Endorsed: Filed Dec. 15, 1908. H. W. Griffith, Clerk Supreme Court, Utah.

33 In the Supreme Court of the State of Utah.

THE STATE OF UTAH, Respondent,
v.
MONTELLO SALT COMPANY, Appellant.

Order Allowing Writ of Error.

Be it remembered that on this 15th day of December, A. D. 1908, came the above named appellant, Montello Salt Company, by its attorneys, and filed herein and presented to the undersigned, the Chief Justice of the above named court, its petition, with assignment of errors, showing that a federal question was involved, and praying for the allowance of a writ of error intended to be urged by it; praying also that a transcript of the record and proceedings and papers upon which the judgment in said cause in the above named court was rendered, duly authenticated, be sent to the Supreme Court

of the United States, and that such other and further proceedings be had as may be proper in the premises. On consideration, whereof, the undersigned, the Chief Justice of the Supreme Court of the State of Utah, does allow the writ of error prayed for by the appellant on its giving the bond, according to law, in the sum of one thousand dollars ($1,000.00).

W. M. McCARTY,
Chief Justice of the Supreme Court of the State of Utah.

Endorsed: Filed Dec. 15, 1908. H. W. Griffith, Clerk Supreme Court, Utah.

34 In the Supreme Court of the United States.

MONTELLO SALT COMPANY, a Corporation, Plaintiff in Error,
vs.
THE STATE OF UTAH, Defendant in Error.

Writ of Error to the Supreme Court of the State of Utah.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Supreme Court of the State of Utah and the Justices thereof, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Utah, before you, or some of you, being the highest Court of law or equity of the State of Utah in which the decision could be had in the said suit between the Montello Salt Company and the State of Utah, wherein was drawn in question the construction of a statute of the United States, and the decision was against the title, right and privilege especially set up or claimed under such statute; manifest error has happened to the great damage of the said Montello Salt Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ so that you have the same at Washington on the 13th day of February 1909 next, in the said Supreme Court to be then and there held that the record
35 and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of said

Supreme Court, the 15 day of December, in the year of our Lord one thousand nine hundred and eight.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER,
Clerk of the United States Circuit Court,
District of Utah.

[Endorsed:] No. 1958. In the Supreme Court of the United States. Montello Salt Company, Plaintiff in Error, vs. The State of Utah, Defendant in Error. Writ of Error from the Supreme Court of the United States to the Supreme Court of Utah. Filed Dec. 15, 1908. H. W. Griffith, Clerk Supreme Court, Utah. W. L. Maginnis, James N. Kimball, S. T. Corn, Att'ys for Pl'ff in Error.

36 In the Supreme Court of the United States of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Nine.

MONTELLO SALT COMPANY, a Corporation, Plaintiff in Error,
vs.
THE STATE OF UTAH, Defendant in Error.

Assignment of Errors.

Now comes the Montello Salt Company, plaintiff in error, by W. L. Maginnis, James N. Kimball and S. T. Corn, Esquires, its attorneys, and says that in the record and proceedings of the Supreme Court of Utah aforesaid there is manifest error, in this, to-wit:

1.

That the said Supreme Court of Utah erred in its judgment in affirming the judgment of the third district court of the State of Utah, in and for the County of Tooele.

2.

That by the action of said Supreme Court of Utah it erred in holding that the claim and title of the plaintiff in error, claimed and maintained by it under the Statutes of the United States, to the land described in the complaint in said action as mining lands was and is invalid, said Statute of the United States being an act of Congress entitled "An act extending the mining laws to saline lands," approved January 31st, 1901.

3.

Said Supreme Court of Utah erred in holding and deciding that the plaintiff in error is and was not entitled to possess and mine upon the said lands under and by virtue of said act of Congress.

4.

37 Said Supreme Court of Utah erred in holding that the plaintiff in error was not entitled to locate, possess and mine upon the said lands under the provisions of the Revised Statutes of the United States relative to the location of placer claims, the same being Sections #2329-#2318-#2320 and #2322 of said revised Statutes.

5.

That said Supreme Court of Utah erred in holding that the claim and title of the defendant in error, the State of Utah, to the land described in the complaint, was good and valid under the provisions of Section 8 of an act of Congress of the United States entitled, "An act to enable the people of Utah to form a constitution and State Government, and to be admitted into the Union on an equal footing with the original states." That by the record aforesaid it appears that the judgment aforesaid was given in favor of the said State of Utah and against the said Montello Salt Company, whereas by the law and Statutes of the United States the said judgment ought to have been given for the said Montello Salt Company and against the said State of Utah, and the said Montello Salt Company prays that the said judgment of the Supreme Court of the said State of Utah may be reversed, annuled and altogether held for nothing, and that the said Supreme Court of the State of Utah be directed to enter a judgment in favor of the said Montello Salt Company and against said State, adjudging said Salt Company to be entitled to the possession of the lands described in the complaint.

W. L. MAGINNIS,
JAMES N. KIMBALL,
S. T. CORN,
Attorneys for Plaintiff in Error.

[Endorsed:] 1958. In the Supreme Court of the United States. Montello Salt Company, Pl'ff in Error, vs. The State of Utah, Defendant in Error. Assignment of Errors to Accompany Petition for Writ of Error. Filed Dec. 15, 1908. H. W. Griffith, Clerk Supreme Court, Utah. W. L. Maginnis, James N. Kimball, S. T. Corn, Att'ys for Pl'ff in Error.

38 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the State of Utah and to Hon. M. A. Breeden, Esquire, its Attorney General, and to W. D. Riter, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, at Washington, in the District of Columbia, within Sixty (60) days from the date hereof pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Utah, wherein the Montello Salt Company is plaintiff in error and you are defendant in error and show

cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William M. McCarty, Chief Justice of the Supreme Court of the State of Utah, this 15th day of December, A. D. 1908.

W. M. McCARTY,
Chief Justice of the Supreme Court of the State of Utah.

Dated December 15, 1908.

Service admitted at Salt Lake City, Utah, this 15th December, 1908.

W. D. RITER.
M. A. BREEDEN,
Attorney General.

[Endorsed:] 1958. The State of Utah, Defendant in Error, vs. The Montello Salt Company, a corporation, Plaintiff in Error. Citation. Filed Dec. 15, 1908. H. W. Griffith, Clerk Supreme Court, Utah.

39 In the Supreme Court of the State of Utah.

THE STATE OF UTAH, Plaintiff and Defendant in Error,
v.
MONTELLO SALT COMPANY, Defendant and Plaintiff in Error.

Bond.

Know all men by these presents, that the Montello Salt Company, a corporation, of the State of Utah, as principal, and J. M. Caggie and R. M. Toy, as sureties, are held and firmly bound to the plaintiff and defendant in error, the State of Utah, in the full sum of one thousand ($1,000.00) dollars, to be paid to the said defendant in error, the State of Utah, its certain attorneys, or assigns; which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 15th day of December, A. D. 1908.

Whereas lately, at a Supreme court of the State of Utah, in a suit depending in said court between the said parties as above, a judgment affirming the judgment of the Third District Court of the Said State of Utah, in and for Tooele County, was rendered against the above named plaintiff in error, the Montello Salt Company, it having obtained a writ of error from the Supreme Court of the United States, to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Utah, citing and admonishing it to be and appear at a session of the Supreme Court of the United

States within sixty (60) days from the date of said citation,
40 to-wit, the 13th day of February, 1909.

Now, therefore, the condition of the above obligation is such that if the said plaintiff in error, the said Montello Salt Company, shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its said plea good, then the above obligation to be void, else to remain in full force and virtue.

J. M. CAGGIE,
R. M. TOY,
THE MONTELLO SALT COMPANY,
By S. T. CORN, *President.*

Sealed and delivered in the presence of
[SEAL.] M. B. CORN.

STATE OF UTAH,
County of Weber, ss:

J. M. Caggie and R. M. Toy, the sureties in the above named bond, being first duly sworn, each for himself says: that he is a resident and householder within the County of Weber, State of Utah, and worth the amount specified in said bond as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution.

J. M. CAGGIS.
R. M. TOY.

Subscribed and sworn to before me this 15th day of December, A. D. 1908.
[SEAL.]
M. B. CORN,
Notary Public, Weber County.

My commission expires Oct. 22, 1912.

The foregoing bond and security for costs was taken by me and is hereby approved this 15th day of December, 1908.

W. M. McCARTY,
Chief Justice of the Supreme Court of the State of Utah.

Endorsed on back: Bond on Writ of Error. Filed December 15, 1908. H. W. Griffith, Clerk Supreme Court of Utah.

41 United States of America.

STATE OF UTAH,
County of Salt Lake, ss:

I, H. W. Griffith, Clerk of the Supreme Court of the State of Utah, in pursuance of a Writ of Error heretofore allowed and hereto attached, wherein the Montello Salt Company is Plaintiff in Error, and the State of Utah, is Defendant in Error, herewith return a full, true

and correct transcript of the record and proceedings had in said cause, also a copy of the judgment rendered in said Supreme Court, the opinion filed, the application for a writ of error, order allowing writ, and bond, together with the original writ of error, assignments of error and citation.

And I further certify that the said copy of the judgment rendered, the opinion filed, the application for a writ of error, order allowing writ, and bond, are full, true and correct copies of the several originals now on file or of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, this the 31st day of December, 1908.

[Seal State of Utah Supreme Court, Jan. 4, 1896.]

H. W. GRIFFITH,
Clerk, Supreme Court.

Endorsed on cover: File No. 21,481. Utah Supreme Court. Term No. 136. Montello Salt Company, plaintiff in error, vs. The State of Utah. Filed January 18th, 1909. File No. 21,481.

Office Supreme Court, U. S.
FILED.
APR 21 1911
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 136.

MONTELLO SALT CO., PLAINTIFF IN ERROR,

vs.

THE STATE OF UTAH.

REFERENCE TO ACTS OF CONGRESS AND PUBLIC DOCUMENTS MADE BY ATTORNEY FOR PLAINTIFF IN ERROR.

Nearly all enabling acts up to and including Colorado granted "salt springs" with 6 sections of land for each spring.

1 S. L., 464, May 18, 1796: SEC. 2. "Every surveyor shall note in his field book the true situation of all mines, salt licks, salt springs and mill seats." SEC. 3. Scioto salt springs and 36 sections, "and every other salt spring that may be discovered, together with the section of one mile square which includes it," shall be reserved for the future disposal of the United States.

2 S. L., 235, May 3, 1803: "An act concerning the salt springs on the waters of the Wabash river."

2 S. L., 277, March 26, 1804: For the disposal of lands in Indiana Territory. "Salt springs and lands reserved for them" excepted. SEC. 6. "And the several salt springs in the said territory, together with so many contiguous sections to each as shall be deemed necessary by the President of the U. S., shall be reserved for the future disposal of the U. S."

2 S. L., 343, March 3, 1805: Disposal of lands in Indiana Territory; orders sale of lands theretofore reserved, except "salt springs and lands reserved for the use of the same."

2 S. L., 470, February 29, 1808: Same as last in Ohio.

2 S. L., 617, February 15, 1811: For sale of lands in Orleans and Louisiana; reserves "salt springs and lands contiguous thereto."

3 S. L., 289, April 19, 1816: Indiana enabling act grants "all salt springs within said territory" with necessary lands, not exceeding in all 36 sections.

3 S. L., 296, April 24, 1816: President authorized to lease the "saline" near the Wabash.

3 S. L., 332, April 29, 1816: Sale of lands in Michigan except "salt springs."

4 S. L., 79, December 28, 1824: Authorizes Ohio to sell "salt springs."

4 S. L., 305, May 24, 1828: Authorizes Illinois to sell part of the land granted for the use of the "Ohio Saline."

4 S. L., 364, March 3, 1829: Authorizes the President to sell "reserved salt springs and contiguous lands" in Missouri.

4 S. L., 451, March 2, 1831: Authorizes sale of land reserved for "salt works" on Vermilion river, Illinois.

4 S. L., 496, January 19, 1832: "An act to authorize the State of Illinois to sell 20,000 acres of saline lands in said State;" authorizes sale of lands granted for the use and support of "salt works" known by the name of the "Ohio Saline."

4 S. L., 505, April 20, 1832: Authorizes lease of "salt springs" in Arkansas.

September 4, 1841: "No lands on which are situated any known salines or mines" shall be liable to entry.

9 S. L., 181, March 3, 1847: Illinois authorized to sell "saline lands" in Jackson County and Arkansas to sell "saline lands."

10 S. L., 15, July 12, 1856: "An act to enable the legislature of the State of Indiana to dispose of the unsold saline lands in said State."

19 S. L., 221, January 12, 1877: "An act to provide for the sale of saline lands;" provides for the sale of "lands that are saline in character" and that are "incapable of being purchased under any of the laws of the U. S."

In 1866 there was an act before Congress to provide for leasing "saline lands or lands containing mineral springs" and was amended to apply only east of the 102d degree of longitude, but failed of passage.

22 S. L., 349, August 7, 1882: Provides for the leasing of "salines or salt deposits on the plains" in the Indian Territory, and declares that "said salines shall continue subject" to the reservations from sale.

25 S. L., 676, February 22, 1889: Enabling act, Montana, Washington and the Dakotas, "in lieu of any grant of saline lands," &c., grants other lands.

1877: "An act to provide for the sale of saline lands:" "That whenever it shall appear to the register and receiver," &c., "that any lands within their district are saline in character," &c., and if "the Commissioner of General Land Office shall find that such lands are saline and incapable of being purchased under any of the laws of the U. S. relative to the public domain," &c. Provided the foregoing "shall not apply to any State or Territory that has not had a grant of salines by act of Congress."

1901: "An act extending the mining laws to saline lands:" "That all unoccupied public lands of the U. S. containing salt springs or deposits of salt in any form, and chiefly suitable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer mining claims."

Lake Mono, 8th Ann. Rep. U. S. Geological Survey, 1886-'87, p. 296: "There are also desiccated lake beds in which the more soluble salts derived from the surrounding rocks have been concentrated for ages and now form fields of common salt that are in some cases many square miles in area and hold lime in all stages of saturation beneath their surface."

Jackson, vol. 3, Messages of Presidents, p. 56, December 4, 1833: Veto of "An act to appropriate for a limited time the proceeds of the sales of the public lands of the U. S. and for granting lands to certain States."

Pierce, vol. 5, p. 216: "It is not believed to be within the intent and meaning of the Constitution that the power to dispose of the public domain should be used otherwise than might be expected from a prudent proprietor; and, therefore, that grants of land to aid in the construction of roads should be restricted to cases where it would be for the interest of a proprietor under like circumstances thus to contribute to the construction of these works."

Pierce, vol. 5, p. 254: "If the systematic reservation of a definite portion of the public lands (the 16th sections) in the States for the purposes of education and occasional grants for similar purposes be cited as contradicting these conclusions, the answer as it appears to me is obvious and satisfactory. Such reservations and grants, besides being a part of the conditions on which the proprietary right of the U. S. is maintained, along with the eminent domain of a particular State, and by which the public land remains free from taxation in the State in which it lies as long as it remains the property of the U. S., are the acts of a mere land-owner disposing of a small share of his property in a way to augment the value of residue, and in this mode to encourage the early occupation of it by the industrious and intelligent pioneer."

JESSE B. BARTON,
Attorney for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1910

No. 136

THE MONTELLO SALT COMPANY,
Plaintiff in Error,

vs.

THE STATE OF UTAH,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The state of Utah, the defendant in error, as plaintiff, brought this action in the State District Court, praying judgment that it be declared to be the owner of a large body of saline land described in the complaint, and for an injunction restraining the defendant, the plaintiff in error here, from in any way interfering with said land. It is alleged in the complaint (Tr. 1) that under the provisions of section eight of the Act of Congress,

approved July 16, 1894, enabling the territory of Utah to enter the Union as a state, the title to all of the saline lands in the State of Utah became vested in the plaintiff, and that it is still the owner in fee of all of said lands. It then (Tr. 1, 2, 3, 4) described, by metes and bounds, a large tract of land in Tooele County, Utah, being in the aggregate some forty thousand acres, and alleges that it is all saline land as described in the Enabling Act. That the defendant (the plaintiff in error) had taken possession of and claimed title to said land (Tr. 4) under certain placer mining locations heretofore made thereon and threatens to dig up and remove the valuable deposits of salt thereon to the irreparable injury of the plaintiff. It then prays judgment that the defendant be adjudged to have no right or title to any part of said lands; that the plaintiff be decreed to be the owner thereof, and that defendant be enjoined from entering upon or exploring the same or removing any salt therefrom. It was ordered that defendant show cause why an injunction should not issue as prayed and that it be in the meantime restrained.

The defendant, the plaintiff in error, in its answer (Tr. 5) sets up that it is the equitable owner of the saline lands in question by conveyance from the original owners who located the same under the laws of the United States; that said locaters were citizens of the United States and entitled to locate placer mineral claims, and setting out in detail the acts done in locating and recording their claims; that at the time this suit was brought, defendant was about to begin work upon the said lands in order to comply with the laws of the United States. (Tr. 6.)

The defendant further answers that on the 16th day

of July, 1894, when the enabling act was passed, the lands in question were not known to be saline in character, but were so covered with soil that their true character was concealed and that they were not discovered to be saline in character until about November 1st, 1906; that in fact, they are covered with a deposit of salt from four to eight feet in thickness.

The defendant furthers answers, that, prior to the discovery of the saline character of the lands, the State of Utah had already selected and received grants from the United States for the full amount of one hundred and ten thousand acres of land provided for in sections seven and eight of the enabling act and the grant for the University had been fully satisfied. And further, that only such lands as had been classified by the Surveyor-General for the Territory of Utah was in the contemplation of Congress when the act was passed.

Defendant furthers denies all the allegations of paragraph two of the complaint and alleges that all the lands mentioned in plaintiff's complaint are lands of the United States, and, prior to said locations by defendant's grantors, were subject to location under the placer laws of the United States as saline lands.

The plaintiff, the defendant in error, demurred to defendant's answer by a general demurrer upon the ground that it did not state facts sufficient to constitute a defense, the demurrer was by the Court sustained and, defendant refusing to plead further, judgment was rendered in favor of the plaintiff as prayed in the complaint.

A judgment in the District Court of the Third Judicial District of the State of Utah, was given and made against the plaintiff in error, and on an appeal taken to the Supreme Court of the state of Utah, that judgment

was affirmed. Thereupon the plaintiff in error brought the case to this court on writ of error, to review the judgment of the Supreme Court of the State of Utah. The said writ of error was taken upon the ground that the decision of the Supreme Court of Utah gave construction to the statutes of the United States, and decided against the plaintiff in error on its claim to title to the land described in the complaint, under the Statutes of the United States.

ASSIGNMENT OF ERRORS.

1.

That the said Supreme Court of Utah erred in its judgment in affirming the judgment of the third district court of the State of Utah, in and for the County of Tooele.

2

That by the action of said Supreme Court of Utah it erred in holding that the claim and title of the plaintiff in error, claimed and maintained by it under the Statutes of the United States, to the land described in the complaint in said action as mining lands was and is invalid, said Statute of the United States being an act of Congress entitled "An act extending the mining laws to saline lands," approved January 31st, 1901.

3.

Said Supreme Court of Utah erred in holding and

deciding that the plaintiff in error is and was not entitled to possess and mine upon the said lands under and by virtue of said act of Congress.

4.

Said Supreme Court of Utah erred in holding that the (Tr. 20) plaintiff in error was not entitled to locate, possess and mine upon the said lands under the provisions of the Revised Statutes of the United States relative to the location of placer claims, the same being Sections 2329, 2318, 2320 and 2322 of said Revised Statutes.

5.

That said Supreme Court of Utah erred in holding that the claim and title of the defendant in error, the State of Utah, to the land described in the complaint, was good and valid under the provisions of Section 8 of an Act of Congress of the United States entitled, "An act to enable the people of Utah to form a constitution and State Government, and to be admitteed into the Union on an equal footing with the original States." That by the record aforesaid it appears that the judgment aforesaid was given in favor of the said State of Utah and against the said Montello Salt Company, whereas by the law and Statutes of the United States the said judgment ought to have been given for the said Montello Salt Company and against the said State of Utah, and the said Montello Salt Company prays that the said judgment of the Supreme Court of the said State of Utah may be reversed, annuled and altogether held for nothing, and that the said Supreme Court of the State of Utah be directed to enter a judgment in favor of the said Montello Salt Company and against said State, adjudging said Salt Company to be entitled to the possession of the lands described in the complaint (Tr. 21).

ARGUMENT.

1.

There is but one question presented in this case: Did the State take title to the saline lands in question by virtue of the Utah Enabling Act, approved July 16, 1894, and without any act upon its part by way of selecting the same as provided in the act itself, or other statutes bearing upon the question?

If not, then they were unoccupied saline lands of the United States, and, as such, were subject to location by the grantors of the defendant under the act of Congress of January 31, 1901, extending the mining laws to saline lands. (31 Stat. L. p. 145.)

We maintain that in no view of the case can it be reasonably held that the grant provided for in section eight, of the Enabling Act, carried the lands in question.

The Enabling Act, Section eight, provides:

> "That lands to the extent of two townships in quantity, authorized by the third section of the act of February twenty-one, eighteen hundred and fifty-five, to be reserved for the establishment of the University of Utah, are hereby granted to the State of Utah, for university purposes, to be held and used in accordance with the provisions of this section, and any portion of said lands that may not have been selected by said territory, may be selected by said State. That, in addition to the above, one hundred and ten thousand acres of land to be se-

lected and located as provided in the foregoing section of this act, and including all saline lands in said state, are hereby granted to said state, for the use of said university, and two hundred thousand acres for the use of an agricultural college therein. That the proceeds of the sale of said lands, or any portion thereof, shall constitute permanent funds, to be safely held and invested by said state, and the income thereof to be used exclusively for the purposes of such university and agricultural college, respectively."

It is insisted that this language grants to the University of Utah, through the state as a medium, not only 110,000 acres of land and such saline lands as might by selection be included therein and all lands known at the time of the passage of the act to be saline in character, but also all lands in the state afterwards discovered to be saline, including the immense body of salt involved in this litigation. But we submit that if such was the intention of Congress, the language used was very unfortunately chosen and it would even seem that some pains had been taken to obscure the expression of that intention. For if that had been the purpose, it was only necessary after the grant of the 110,000 acres to add the words, "and all saline lands in said state now known or hereafter to be discovered." And in view of the legislation of Congress during almost the entire history of the country upon the subject of salines, which we will later call attention to, it may be taken as certain

that some such words clearly expressing its intention, would have been employed. But instead, the word, "including" is inserted which, under the interpretation contended for by respondent is wholly without significance in the sentence, and fairly construed, gives an entirely different meaning to it. In other words, in order to adopt the construction contended for by defendant in error the court must strike out and entirely disregard the word "including." We know of no reason why the court should exercise any such arbitrary power, but upon the contrary, to do so would be in direct violation of the established rule of construction in such cases.

Southerland says:

> "The settled rule of construction is that a public grant, whether of property, franchises or privileges, is construed strictly in favor of the public. Whatever is not unequivocally granted is withheld."
>
> Suth. Stat. Const. sec. 387.

The rule is variously stated in numerous cases and always in the most emphatic terms. In Leavenworth R. R. Co. vs. U. S. 92 U. S. 733, at page 740, the court say:

> "The rules which govern in the interpretation of legislative grants are so well settled by this court that they hardly need be reasserted. They apply as well to grants of lands to states, to aid in building railroads, as to grants of special privileges to private corporations."

And again on the same page, quoting from the Du-

buque and Pacific Railroad Company vs. Litchfield, 23 How. 66:

> "All grants of this description are strictly construed against the grantee; nothing passes but what is conveyed in clear and explicit language; and, as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute and, if not thus expressed, they cannot be implied."

The case quoted from had reference to a grant to the territory of Iowa to aid in the improvement of the navigation of the Des Moines river. And again upon the same page the court say:

> "This" (the intention of Congress) "is to be ascertained from the terms employed, the situation of the parties, and the nature of the grant. If these terms are plain and unambiguous, there can be no difficulty in interpreting them; but if they admit of different meanings—one of extension, and the other of limitation—they must be accepted in a sense favorable to the grantor. And if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them. In other words, what is not given expressly is withheld."

In Barden vs. Northern Pacific Railroad, 154 U. S. 288, at page 321, the court say:

> "The exclusion from its operation of all mineral lands is entirely clear, and if there were any doubt respecting it, the established rule of construction applicable to statutes making such grants would compel a construction favorable to the grantor." See also Fanning vs. Gregoire, 16 Howard 526; Mills vs. St. Clair county, 8 How. 526; Minturn vs. Larue, 23 How. 475; United States vs. Arredondo, 6 Peters 758.

To strike out the word "including" would be to extend the grant by implication and construe the act most strongly against the grantor; for the effect, by the decision in this case alone, to say nothing of similar deposits which may in the future be discovered, would be to increase the 110,000 acre grant by some forty thousand acres. Or, in view of the statement of the answer, which the demurrer admits to be true, that the deposit of salt is from four to eight feet thick, it would increase the grant by two or three hundred million tons of salt, worth in the aggregate an almost fabulous sum of money and would confer upon the university an endowment many times greater than that of any other educational institution in the world. Quoting again from Leavenworth vs. United States supra, the grant

> "should be neither enlarged by ingenious reasoning nor diminished by strained construction. The interpretation must be reasonable and such as will give effect to the intention of Congress. This is to be ascertained from the terms em-

played, the situation of the parties, and the nature of the grant."

We submit that the application of this principle will not permit the striking out of a word in the act when the effect would be to create an endowment for the university many times greater than Congress ever dreamed of conferring upon any other university in any of the states. Such a construction violates the rule above quoted in every detail. It does not ascertain the intention "from the terms employed," but requires the court to leave out of its consideration one important term of those employed in defining the grant; the word "including." It is not supported by "the situation of the parties," for it is not the case of a great public enterprise of national importance which the government might be supposed to be willing to aid by donations of hundreds of millions of dollars. It does not comport with "the nature of the grant," for Congress has made many grants to states in aid of their universities, but never one even approaching this in magnitude or value. And it violates the rule in not being reasonable in view of the circumstances.

In Barden vs. Northern Pacific Railroad, supra, in which the railroad company was claiming mineral lands under a grant of Congress, this court in refusing to vary the language of the act, invoked this principle exactly as we urge it in this case, saying:

> "To incorporate the term 'known' into the act and add it to the description of the mineral excepted would also contravene a settled rule in the construction of grants like the one before us, that nothing will pass to the grantee by im-

> plication or inference, unless essential to the use and enjoyment of the thing granted."

And in the same case they also treat as of controlling importance the great value of the minerals supposed to underlie the lands claimed by the railroad company under the act and say, at page 318-19, that it "passes belief" that Congress could have deliberately designed under the circumstances

> "to give away to a corporation of their own creation not only an imperial domain in land, but the boundless wealth that might be buried in the mineral regions covered by 80,000 square miles."

We are unable to see how to read a word into the statute, and one, too, which in proper cases has been read in by this court, is more in violation of the rule of construction referred to, than to strike out one, when the effect in both cases would be to extend the grant. And we submit that the value of the property involved was no more out of proportion to the enterprise in the Northern Pacific case than in this. The Northern Pacific was a great transcontinental road which Congress was aiding in order to open up for settlement thousands of square miles of otherwise uninhabitable country, to create additional facilities for transporting troops and munitions of war in case of necessity and, it being at the time of the civil war when the government was threatened with disintegration, to bind the eastern and western sections together by common commercial interests. While the university, however beneficial, is a merely local institution

and of comparatively limited influence. We think, therefore, in view of the great value of the property alone and leaving out of consideration the many other circumstances which increase the improbability, that "it passes belief" that Congress could have deliberately designed to grant this enormously valuable property to the institution in question.

II.

We submit that the construction of the enabling act insisted on by defendant in error is out of line with the legislation of Congress upon the subject of salines throughout the history of the country. The general policy of the government has been to reserve them from settlement and dole them out to the states in limited quantities, from time to time, carefully limiting their power of disposing of the same. This general policy was not changed until January 31, 1901, when the act was passed declaring them to be subject to location and purchase under the provisions of the law relating to placer mining claims; and even then the amount which the same person might locate or enter was limited by the act to twenty acres. 31 Stat. L., p. 145.

The method of Congress in dealing with salines may be illustrated by reference to some of the statutes on the subject. By the act for the sale of lands in the Northwest territory, all salt springs were reserved for future disposal by the United States. 1 Stat. L., 466. By the Ohio enabling act of April 30, 1802, a six-mile reservation, including the Scioto Salt Springs, was granted to

the state and the legislature was forbidden to sell or to lease them for more than ten years. 2 Stat. L. 175. In 1824 a special act authorized the sale of so much of the reservation as had not been sold and prescribed that the proceeds should be applied to literary purposes. 4 Stat. L. 79. Missouri was granted salt springs not more than twelve in number, to be selected on or before January 1, 1825, and they were not to be sold or leased for more than ten years without the consent of Congress. 3 Stat. L. 547. Michigan was likewise granted salt springs not more than twelve in number, was prohibited from selling or leasing them for more than ten years without the consent of Congress, and they were to be selected by January 1, 1845. 5 Stat. L. 60. Iowa was granted the same number with the same restrictions as to selling or leasing them, and they were to be selected in one year. 5 Stat. L. 790. Arkansas, in 1836, was granted salt springs not over twelve in number, to be selected by January 1, 1840, and with the same restrictions as to selling or leasing them. 5 Stat. L. 58. By a prior act, passed in 1832, the territory of Arkansas had been granted permission by Congress to lease certain designated salt springs for five years for the construction of roads. And by the same act the salt springs were reserved for future disposal by the United States, and the act carefully included springs to be afterwards discovered. 4 Stat. L. 505. These provisions illustrate the care with which Congress has disposed of its salines, and if it has ever granted to any state, upon its admission, all saline lands, discovered and undiscovered, within its borders, without any restrictions upon its power of disposing of them, as it is claimed to have done in the case of Utah, we have been unable to discover it.

And as in granting such lands to the states, so it has been equally careful and deliberate in authorizing the several states to dispose of them. In 1829, by a special act, the president was authorized to expose to sale as other public lands reserved salt springs in Missouri. 4 Stat. L. p. 304. In 1828, Illinois was authorized to sell 30,000 acres of the lands which had been given to the state for the use of the salt works. 4 Stat. L. 305; and in 1832, 20,000 more. 4 Stat. L. 496. In 1847 Michigan, Illinois and Arkansas were authorized by a special act to sell their saline lands. 9 Stat. L. 181-2. And as further illustrating the care with which Congress has guarded the saline lands, in the Indian Territory all discovered salt springs were reserved and their entry made fraudulent and void. 2 Stat. L. 280. So in Alabama there was a grant of all salt springs and lands reserved for the use of the same, and necessary to work them, not exceeding in the whole thirty-six sections, and there was the usual restriction not to sell or lease them for more than ten years. 3 Stat. L. 491. So in the case of Mississippi, certain lands acquired from the Indians were directed to be sold, but salt springs and contiguous lands were excepted. Act of June 5, 1809. 2 Stat. L. 5-48.

And in no instance, up to the passage of the Utah act, so far as we have been able to pursue the investigation, have saline lands or salt springs ever been granted to any state by a blanket provision inserted in the body of an act and conferring an unrestricted power of disposal of all saline lands in a state, discovered and undiscovered, as is claimed to have been done in the case of Utah. And it would be the more remarkable if such had been the action of Congress from the fact that Utah was

from its known physical conditions at the time more likely to disclose in the future large deposits of salt than perhaps any state in the Union. Subsequently (30 U. S. Stat. L. 484) all saline lands in the territory were granted to the Territory of New Mexico. But the language employed was entirely different, the wording being, "Sixty-five thousand acres of non-mineral, unappropriated and unoccupied public land, to be selected and located as hereinafter provided, *together with* all saline lands in said territory." And it will be observed that the acreage in the case of New Mexico is reduced to 65,000 acres from the 110,000 acres in the Utah act.

In view of the foregoing considerations, we believe that the court can not reach the conclusion that it was the intention of Congress to make this enormous and unprecedented donation to the State University. But, while perhaps not essential to our case, it is pertinent to inquire what was the legislative intent. And we resort first to the language of the act.

That the language is clumsy and ambiguous can not well be denied, but we think at the same time that just what Congress had in mind in passing the act may be ascertained with reasonable certainty. The principal controversy in the case hinges upon the construction of the words "and including." With either one of these words eliminated the controversy would in a great measure disappear. Eliminating the word "and" leaves the clause to read "110,000 acres of land to be selected and located as provided in the foregoing section of this act, including all saline lands in said state." This would seem very clearly to include whatever saline lands were granted within the 110,000-acre grant if the word "including"

has any meaning at all. And an examination of the reports of the committees of Congress upon this bill will disclose that the word "and" does not appear in the discussion of the bill by either the majority or the minority of the committee, but both of them speak of it as if the word "and" was not in the bill and in the debates upon the floor of the house no member in discussing the matter uses the word "and" in this connection. True, counsel on the other side cite some authorities in the court below that the court will not consider documents or debates. But this court in later cases has done so and given them weight in deciding questions before it as in Binns vs. the United States, 194 U. S. 486. Johnson vs. S. P. Co. 196 U. S. 1. In Snyder on Mines, Section 218, the author in speaking of the provision omits the word and says "there was an additional grant of 110,000 acres, including all saline lands." And it is a principle of construction frequently stated that "and" and "or" are considered of less importance in construing statutes and their direct meaning is more readily departed from than other words; and if necessary to give effect to the intention of the parties to an instrument will be excluded or disregarded altogether.

Railroad vs. Bartlett, 11 N. E. (Ill.), 867.
Witherspoon vs. Jarrigan, 76 S. W. (Texas), 445, 447.
People vs. Lyte, 40 N. Y. Supp., 153, 161.
Boyle vs. McMurphy, 55 Ill. 236.
Simpson vs. Morris, 3 Yeates, 104.

We think in the connection in which it is used in the act it should be excluded or disregarded as meaningless.

At the same time it is perhaps not important whether it is held to be stricken out or not, provided its presence in the sentence is not used to force an unusual definition of the following word "including" not authorized by any of the dictionaries. The lower court held that it must be retained and that it expresses "the relation of addition." They then hold that the word "including" is used as the equivalent of "also" upon the authority of U. S. vs. Pierce, 147 Fed. 199, a tariff case, in which the statement is made that the word is frequently employed in that sense in tariff acts. This converts the phrase "and including all saline lands" into another, and we respectfully submit very different phrase, "and also all saline lands." And we think it is also apparent that, if "including" is to be transformed into "also," the word "and" still entirely fails to affect the meaning. Either language, "also all saline lands" or "and also all saline lands" would equally constitute a grant of all saline lands to the state. So that even in the view adopted by the state court the word "and" is surplusage and in no way affects the meaning. But we will discuss this language and the cases cited in another part of our brief.

And omitting the word, as was done in all the reports and debates in Congress, the grant is "one hundred and ten thousand acres of land, including all saline lands in said state."

And this means that the saline lands granted are a part of and to be included in the one hundred and ten thousand acres or else the word "including" is held to be meaningless and stricken out by the court or else wrested from its obvious and ordinary signification. But this would be a liberal construction in favor of the

grantee and not strictly in favor of the grantor as required by the rule above cited. And moreover we are unable to discover in the act itself, the nature of the grant or the situation of the parties anything that would justify the elimination of the word. On the contrary, we submit that the act inself quite clearly indicates that the saline lands granted are to be a part of the one hundred and ten thousand acres. Section thirteen provides "that all lands granted in quantity or as indemnity by this act shall be selected under the direction of the secretary of the interior from the unappropriated public lands of the United States within the limits of the said State of Utah." In other words the act provides only for the selection of lands "granted in quantity or as indemnity." There is no provision in this section or anywhere in the act for the selection of lands granted by quality or character, and if it should be held that these saline lands are granted to the state, as such, if follows that there is no officer or tribunal authorized to determine what are lands of the quality and character granted. And upon the principle *expressio unius est exclusio alterius,* we think it must be held that it was not in the contemplation of the statute that there were any lands to be selected, according to their character or quality. And the omission to provide for the selection of saline lands as such would be the more extraordinary in view of the fact that the matter of selection is frequently referred to and the method pointed out, as for instance in sections six, seven and eight. And it may be further observed that the act itself undertakes to provide the method of interpretation of these land grants for it states in the closing part of section twelve:

> "The said State of Utah shall not be entitled to any further or other grants of land for any purpose than as EXPRESSLY provided in this act."

We also call the attention of the court to the fact that in the debate upon the bill in Congress there is no intimation that the saline lands constitute a separate acreage. It is plain that if the salines were to be in addition to the 110,000 acres, it would make the precise acreage of the total grant uncertain, as the number of acres of salines in the proposed state is nowhere mentioned in the bill, or in the debates; and, indeed, could not be as they were unknown. But all the members discussing it treat the total grant as consisting of a definite number of acres. As for instance, Mr. Newlands at page 209, Vol. 26, of the Congressional Record, says:

> "The bill as reported makes a direct appropriation and donation of 1,350,000 acres of land, including all saline lands, and in addition thereto, for school purposes, four sections in each township, amounting to 6,043,311 acres, thus making a total donation of 7,393,311."

And in speaking of the report of the minority of the committee, he further says:

> "Should the amendment proposed by them be adopted, the bill would still make a direct and unconditional donation to the state of 930,000 acres of land, including 3,000 arces of saline lands. The proposed amendment also donates to the state of Utah, when admitted, for school

purposes, 3,021,156 acres, making a total donation of 3,751,156. acres."

It is, we say, entirely plain that if an uncertain acreage of saline lands was to be added to the 110,000 acres, then the total acreage of the donation would have been impossible of ascertainment or statement at that time. But Mr. Newlands, Mr. Rawlins, who, was the delegate from Utah, and all others who discuss the point, treat it as a grant of a definite number of acres; or taking into consideration the four sections in each township for school purposes, as being capable of definite ascertainment by mere calculation. This is incapable of explanation if the saline lands consisting of an uncertain number of acres were to be granted in addition to the lands granted in quantity.

This court will doubtless also give due weight to the construction given to the act by the land department of the United States. The commissioner of the general land office has acecpted and allowed selections of saline lands made by the state authorities as a part of the 110,000 acres donated to the university, a fact of which this court will take judicial notice. It must also be considered that this action of the land commissioner was based upon the request made by the state of Utah, and we therefore have a contemporaneous construction by both parties to a contract or grant, which is certainly entitled to weight. We think, therefore, it must necessarily be held that the saline lands granted are includede in, and a part of, the 110,00 acres and not in addition thereto.

It may be urged that the expression, "all saline lands in said state" indicates an intention to grant all the lands

of that character in Utah to the state. But if such was the intention of Congress it in no way conflicts with the provision that they must all be included within the one hundred and ten thousand acres. We have no warrant for assuming that Congress estimated the saline lands of the state; that is lands valuable for their saline product, at any enormous acreage or value, or at any acreage that could not be included within the one hundred and ten thousand acre grant. Indeed,, we have the right to assume that the law-making power, before it undertook to legislate upon the subject, acquainted itself with the conditions as they existed, or were supposed to exist, at the time. And any investigation that could have been made at that time would have disclosed only a few hundred, or or at least a few thousand acres, of saline lands in the state. The reasonable presumption is that Congress had that fact in view and the language of the act indicates that it intended to give to the state those lands if it chose to accept them by selecting them as a part of the one hundred and ten thousand acres in the way pointed out by the statute. And in that case no clasification of the lands as saline would be necessary and it would not be necessary to provide any special method of selection for them. They could be left to be selected under section thirteen like all other lands granted in quantity. And from the fact that they were so left the inference is very strong that they were to constitute a part of the lands granted in quantity. The language of the act and the omission to provide any method of selecting any saline lands, as such; that is, by their character as salines, so clearly indicating that they were to be included in the one hundred and ten thousand acres, it is a necessary

inference that only *known* salines were within the contemplation of Congress and the purvew of the act. They could not determine, and it is a violent presumption to suppose that they would undertake to determine, that salines in excess of one hundred and ten thosand acres might not in the future be discovered, or that lands of that charatcer might not be discovered, after the hundred and ten thosand acres were selected and the grant satised.

This view that Congress had only in contemplation the known area of saline lands in the state and that the intention was to confer authority to select them as part of the one hundred and ten thousand acres, fulfills the terms of the act and is, in our opinion, the only interpretation which does fulfill all its terms and reasonably construe its provisions.

We submit, therefore, that the language of the act itself does not sustain the position of the defendant in error, but that of the plaintiff in error, that the construction insisted upon by the defendant in error would place the act out of line with the legislation of Congress upon the subject during the entire history of the country; that it is contrary to the contemporaneous construction of the act by Congress itself and by the land department, and by the state land board; that it is not a reasonable construction in view of the value of the property, the situation of the parties or the character of the grant. And finally if the language of the act is ambigious and the question in doubt, if Congress did not clearly and without doubt intend to grant these lands to the state, then the doubt must be resolved in favor of the government.

The court below agrees with us, that if the language

employed in the enabling act is ambiguous, and from the situation of the parties and the nature of the grant, it is uncertain whether saline lands were or were not included within the one hundred and ten thousand acres of land, "the rule of construction applicable to statutes making such grant, would compel a construction favorable to the grantor." (Tr. 15) But the court goes on to say that there is nothing ambiguous in the language used in the enabling act, to-wit, this language: "That in addition to the above one hundred ten thousand acres of land to be selected and located, as provided in the foregoing section of this act, and including all saline lands in said state, are hereby granted to said state for the use of the said university * * *." And then proceeds to hold and decide that the word "including" is, in the act and sentence above given, used as the equivalent of "also," thus, confessing that without departing from the ordinary signification of the word "including" the act would be ambiguous.

The ordinary signification of the term, as defined by the dictionaries, both Webster and the Standard, is "to confine within; to hold; to contain; to shut up; embrace, and involve." For the definition of the word as given by the Supreme Court of Utah, it relies upon the case of In re Goetz, 75 N. Y. Supp. 750; Hiller vs. U. S., 106 Fed., 63; and U. S. vs. Pierce, 147 Fed., 199.

That it is, in a sense, a word of addition in the act involved, there can be no question. As already shown by the settled policy of the government up to 1901, saline lands were reserved from location under any of the acts of Congress, providing for the acquisition of the public lands and were only granted to states by special and carefully guarded provisions. And but for the

words, "including all saline lands," such lands in Utah would not have been subject to selection as part of the grant of 110,00 acres. In this sense, and in this sense alone, it is doubtless a word of addition. This is the ordinary signification of the word: To include by particular reference something which is not, or might not be, construed to be, covered by the general terms of an act. And there is nothing in the language or context of the enabling act that would require any other than the ordinary definition to be given to the word. Yet the state court, while declaring that the language is clear and unambiguous, find it necessary to give to the word a meaning, at least unusual and not authorized by any of the dictionaries or by the careful and comprehensive legal publication, "Words and phrases." In the case of In re Goetz, 75 N. Y., Supp. 750, relied upon by the Supreme Court of Utah, the New York court attaches to the word ~~niture, plate, etc., and it was contended that nothing was~~ substantially the meaning upon which we insist. It was a bequest "of all my personal property, including furniture, plate, etc. and it was contended that nothing was bequeathed but the property enumerated after the word. But the court held that the enumeration was either surplusage or an addition to the general language and that the bequest covered all the testator's personal property. The question at issue, there, was wholly different from the question here, but in so far as the decision is applicable, it sustains the view of the plaintiff in error.

The case of United States vs. Pierce, 147 Fed. 199, although in the opinion the court say "the word 'including' was used as the equivalent of 'also,' a sense in which it is frequently used in tariff acts;" does not seem to

strengthen the position of defendant in error. But an examination of the opinion and also of the opinion in the court below (United States vs. Pierce, 140 Fed. R. 962) which it affirms, shows that the definition of the word "including" is substantially the same as that we urge in this case. The question arose, whether a certain importation of pulp wood should be classified as "like blocks or sticks" under paragraph 200 of the tariff act and subject to 20 per cent duty or under paragraph 699 and on the free list. Paragraph 699 puts upon the free list "logs and round unmanufactured timber, including pulp woods, etc. In holding that it was properly classified under 699 the Circuit Court said: "Logs and timber are generally much longer than these pulp wood sticks, and by those names might not be thought to include them without more, and their express inclusion in the wood schedule seems to have been made for greater certainty in taking them from the paper schedule where they had been before." And the statement of the Circuit Court of Appeals that the word was used in the sense of "also" was made in reply to the contention of the government that by the use of the word "including" Congress intended to put only such pulp woods on the free list as should also be round unmanufactured timber. Pulp wood having been upon the free list for many years the court refused to construe the word as a limitation upon such free list, but adopted the view of the court below that the express inclusion was for the purpose of greater certainty in taking them from the paper schedule and adding them to the wood schedule whose language would not otherwise have included them. In the same way we contend that saline lands would not have been included in the grant of 110,000 acres without more, but

by the express inclusion of the statute they are included in the 110,000 acres just as other non-saline lands.

The other case relied upon in the court below, Hiller vs. U. S. 106, Fed. R. 73, is perhaps not specially valuable as authority, as the decision is based upon a comparison with other provisions of the particular schedule, but in so far as it is applicable it is strongly in favor of our view. The case involved the duty to be paid on certain cotton braids to be cut into shoe laces. The collector clasified them under paragraph 339, which imposed a duty on "embroideries and all trimmings, including braids, etc." The importers contended that these braids were not trimmings; that they were not properly classified under that paragraph, and that the meaning of the language was "all trimmings, including braids used for that purpose." The government upon the other hand maintained that the meaning was "all trimmings among which are included braids," etc., and the court sustained the construction of the government officials. Similar reasoning in this case would construe the act as a grant of 110,000 acres of land, within which 110,000 acres is included all saline lands. And this, like all other fair reasoning in the case, brings us again to the necessary conclusion that all saline lands granted were intended by Congress to be a part of and included within the 110,000 acre grant. But, as admitted by the pleadings, the state has exhausted the 110,000 acre grant and the saline lands in question were not selected as part of it.

"Include" or the participial form thereof, is defined "to comprise within;" "to hold;" "to contain;" "to shut up;" and synonyms are "contain;" "enclose;"

"comprise;" "comprehend;" "embrace;" and "involve."

The definition of the word "including," as applicble to this case, is contained in the case of Neher vs. McCook Co., 11 S. D., 422, where the act provided that the sheriff should be entitled to receive sixteen dollars in fees for summoning jurors, including mileage, and it was held that the sheriff was not entitled to mileage in addition to the specific fee provided.

And in another case, Brainard vs. Darling, 132 Mass., 218. The language there was in the construction of a legacy contained in a will. The language provided "a legacy of $100.00, including money trusteed in a certain bank." It was construed that the legatee was not entitled to the sum of $100.00 in addition to the sum trusteed in the bank, but only $100.00, including such sum.

And again, it was held in Henry's Executor vs. Henry's Executor, 81 Ken., 342, that "a beqest of $14,000.00, including certain notes in bank," was to be construed as embracing and constituting the notes as a part of the $14,000.00, and not to mean that the notes were to pass in addition to that sum. These cases are all particularly in point in this case.

It seems to us there can be no question or doubt that under the language in the enabling act, Congress only meant by this clause to grant the state of Utah, for university purposes, one hundred and ten thousand acres of land. And, in the selection of that land, any part or the whole of it could be saline lands. Prior to the grant to the state of Utah, it had always been the policy of Congress, in granting saline lands to the newly organized

states, to limit the grants in quantity and restrict them in the disposition of the same, but when it came to Utah, they departed from the policy of restriction and granted the one hundred and ten thosand acres, with the right to select the whole of the same, or any part thereof, from saline lands.

It is held by the Supreme Court of Utah, in its opinion in this case, that the grants to the state of Utah must be construed most favorably to the government, the grantor. (Tr. pp. 14, 15.) And it was conceded by counsel for the state that this was so. Under this holding and concession, as well as under the authorities heretofore cited, we contend that the grant in question, so far as it granted saline lands, was a grant only of such saline lands as were known to be such at the time the grant took effect, and this would be true, even if all the saline lands in the state of Utah were granted in addition to the one hundred and ten thosand acres. To hold otherwise would render every title granted to a homesteader or other claimant under the United States laws, of lands in this state, uncertain and of little value, for under the broad claim made by the state, if a homesteader, after he secured his patent from the United States, should discover under his land, a bed of salt, the state could eject him therefrom. In support of our contention we cite Barden vs. Northern Pacific, supra; Shaw vs. Kellogg, 170 U. S., 312. Deffenback vs. Hawke, 115 U. S., 392; Morton vs. Nebraska, 88, U. S. 660 (22 Law Ed. 639) and cases therein cited; Steele vs. St. Louis Smelting & Refining Co., 106 U. S., 360; (27 Law Ed. 226) Davis vs. Wiebold, 139 U. S., 507.

In Deffenbach vs. Hawke, *Supra,* this court after

referring to the townsite and other statutes and the provisions excepting mineral lands from their operation, say: "It is plain, from this brief statement of the legislation of Congress, that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar or copper can be obtained under the pre-emption or homestead laws or the town site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the states of Michigan, Wisconsin, Minnesota, Missouri and Kansas. We say "land *known* at the time to be *valuable* for its minerals," as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in effort to extract them. It is not to such lands that the term "mineral" in the sense of the statute is applicable. * * * We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles, which may be issued for other kinds of lands, in which years afterwards rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the pre-emption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term *known* to be valuable at the time of sale to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued."

The word "*known*" does not occur in most of the statutes referred to, but it is read into them by the court to avoid a disastrous result evidently never intended by Congress, just as we contend it must be read into the enabling act in this case. We think the court will not adopt a construction of the act which would unsettle the title to all lands in Utah acquired from the government since the admission of the state in January, 1896. In the subsequent case of Davis vs. Wiebold, *supra,* the same principle was emphasized and discussed in greater detail.

And neither can it be maintained that, if the government should issue its patent to lands to homesteaders, or others, which were subsequently discovered to be saline lands, the settler would be protected in his title for the reason that the issuance of the patent would be a conclusive determination by the government that the lands were not saline within the meaning of the law. For if, as contended by the defendant in error, all salines passed to the grantee immediately upon the taking effect of the enabling act, without selection, or other action, by the state, all ownership or control of the government at once ceased, and, as repeatedly held by this court, its patent would be void and powerless to affect the status of the land in any way; the land department having no jurisdiction to transfer them, its attempted conveyance of them would be inoperative and void. St. Louis Smelting & Refining Co. vs. Kemp, 104 U. S., 636; Doolin vs. Carr, 125 U. S., 618; Lake Superior Ship Canal Co. vs. Cunningham, 155 U.S., 354. We maintain therefore that whatever interpretation may be given the language of the act, none but *known* salines would pass by its provisions, unless selected as part of the 110,000 acre grant.

We contend, further, that all saline lands in the state of Utah, not selected as required by the enabling act, are and were, up to the time of such selection, at any time after the passage of the act of Congress in 1901 throwing open saline lands to location under the placer mining law of the United States, subject to location thereunder. For illustration: take the lands in controversy in this case. These lands are situated in the western part of the state of Utah, in what is known as the Great Desert, and at the time of the passage of the enabling act, and up to the year 1906, were not known to be saline lands, and as it is admitted by the defendant inerror by its demurrer to the answer, and which was the fact, were covered with soil and earthy substance, and gave no indication upon the surface, that there were beds of salt underlying it. And the parties making the location, having made the discovery of these salt beds, and this practically eleven years after the admission of the state of Utah into the Union, had a right to presume that the United States was still the owner of the lands, and it is now too late for the state to claim them under its grant. If it can, then every claimant under the United States of lands acquired subsequent to the admission of the state into the Union, is subject to be deprived of his title in event salt is discovered in commercial quantity underneath the surface of his land.

We further maintain that if the grant referred to is a grant of all saline lands to the state, that the state's title did not accrue so as to defeat the title of the United States, or rightful claimants under it, until the selection by the state, and the confirmation thereof by the Secretary of Interior. In this we think we are supported by

he numerous decisions of this court, in the cases involv-ng various railroad land grants, wherein it is repeated-y and constantly held that any claims inaugurated for ny portion of said lands prior to the filing of the maps f definite location by the railroad companies, withdrew uch lands claimed from the grants to the railroad com-panies, even though this court holds said grants to be grants *in praesenti*. Such grants were floating grants, as the grant involved here is, until the land was definitely located, by filing of the maps, and in this case, by se-lection and confirmation, for until then neither the United States nor claimants under it, where the lands did not present the appearance of salt on the surface, could know that such lands would be claimed by the state. In this view we confidently think and believe that we are supported by sections six and seven of the Utah enabling act, and by the construction thereof, given by the legis-lature in providing the manner in which lands granted by the enabling act shall be selected, and also by section thirteen of the act which provides that selections shall be made from the "unappropriated" public lands of the United States.

The legislature of Utah enacted, in its session of the year 1896, a statute, providing for a state board of land commissioners which statute, so far as it relates to the creation of said board, was carried into the Revised Statutes of 1898 as section 2321, and again carried into the Compiled Laws of Utah, 1907, as section 2321, which reads as follows:

"Board of land commissioners created. A state board of land commissioners is hereby created, which shall consist of five resident citizens of the state, who

shall be appointed by the governor, by and with the consent of the senate." * * *

And in said statute creating said board it is provided that said board should cause to be selected all the public lands then owned by the state, or the lands, the title to which may hereafter be vested in the state, to be selected and registered, which provision of the said statute was carried into the Revised Statutes of Utah, 1898, and again into the Compiled Laws of Utah, 1907, as section 2327, which reads as follows:

> "Board to select land and invest proceeds. The board shall cause all the public lands now owned by the state, or lands, the title to which may hereafter be vested in the sates, to be selected and registered. * * * "

And in the same statute it is provided that all selections of land shall be made in legal subdivisions, according to the United States surveys, and when the selections had been made and approved by the board, it should take such action as should be necessary to secure the approval of the proper officers of the United States and the final transfer to the state of the lands selected, which provisions of the statute was carried into the Revised Statutes of Utah, 1898, and the Compiled Laws of Utah, 1907, as section 2330, which reads as follows:

> "Selections by legal subdivisions. Transfers to and from United States. All selections of land shall be made in legal subdivisions, according to the United States surveys, and, when the selection has been made and approved by the board, it shall take such action as shall be necessary to secure the approval of the proper officers of the United States, and the final transfer to this state of the lands selected. * * *"

The state of Utah, by these laws, has given construction unequivocally to the grant in question here, that all lands were to be selected by it. And we are entitled, having entered upon the lands in controversy here in good faith, and made locations thereof, to have the benefit of that construction.

Under the broad claim made by the defendant in error, there is no way to determine what lands in Utah are saline lands and what are not, unless as we contend, the land shall be selected as provided in the enabling act, and by the legislature of Utah in the sections cited, in which it is provided that the Secretary of Interior shall finally determine, and until such selections and determination, it is certainly true that all of the unoccupied lands of the United States are subject to be possessed, claimed, and entered under the laws of the United States. And no provision is made in the enabling act itself for any selection, except from the "unappropriated" public lands of the United States, as provided in section thirteen.

We, therefore, respectfully submit that the judgment of the court below, and the judgment of the Third District Court of the state of Utah, for Tooele County, should be reversed, with directions to the Supreme Court of Utah to remand this cause to the said Third District Court, with directions to overrule the demurrer to the answer, and for such other proceedings as may be proper and in the course of regular proceedings.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1910.

No. 136

THE MONTELLO SALT COMPANY,
Plaintiff in Error,

vs.

THE STATE OF UTAH,
Defendant in Error.

In Error to the Supreme Court of the State of Utah.

SUPPLEMENTAL BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

The excuse for presenting this supplemental or additional brief and argument for plaintiff in error, is that the Honorable William L. Maginnis, who was one of the associated counsel in the state courts, died October 26, 1910. It was then decided to call in other counsel to represent the interests which had been represented by Judge Maginnis, but lest the case would be called so early in the term that time would not be sufficient for a conference and then

rewriting the brief already nearly prepared, that was finished up ready for filing and work begun on this additional brief in the hope that it also would be in print and served in accordance with the rules.

There is no canon of statutory construction more emphatic than that every legislative enactment is to be construed to comply with the intent of the legislature when that intent can be ascertained.

This court said in *Holy Trinity Church* v. *U. S.*, 143 U. S., 457, in construing the Alien Contract Labor Law:—"It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers;" and in that case the court admitting that it came clearly within the letter of the law yet read into that law an exception, relieving that defendant from the operation of the law, and in *U. S.* v. *Laws*, 163 U. S., 258, this court read still another exception into that same act.

The Supreme Court of Oklahoma in *Maben* v. *Rosser*, 103 Pac., 674, uses most apt language in this connection, where it holds that a certain rule of construction which was invoked

> "must yield to that other and always superior canon of construction, which declares that in construing a statute, the primary object shall be the intention of the lawmakers, and where any rule of construction defeats that intention, it must be abandoned."

Again in *M. & O. R. R. Co.* v. *Tennessee*, 153 U. S., 486, this court holds that legislative contracts should

be read in the light of the public policy entertained, and the purposes sought to be accomplished at the time they were made, and that it is frequently necessary to recur to the history and situation of the country, in order to ascertain the reason as well as the meaning of many of the provisions of the laws.

In two cases in the 92nd U. S., namely, *Newhall* v. *Sanger,* page 761, and *L. L. & G. R. R. Co.* v. *U. S.,* page 733, it is held that a grant to a state must be clearly defined, and whenever courts have been called upon to pass upon the question, it has been held that grants by a legislative body must be so construed as that the grantee takes nothing by presumption.

Then, too, in private grants or deeds, the intention of the grantor governs, often to the extent of adding to or taking from the words of the deed. In *Moore* v. *Magrath,* Cowper 9, the court of Kings Bench held that where the grantor owned lands in the counties of Mayo, Kings, Roscommon and other counties in Ireland, and made his deed granting by specific description, lands in Mayo and Kings, following with the words, "together with all other the said Michael Moore's lands, tenements, hereditaments in the Kingdom of Ireland, &c., to have and to hold, &c., with all other the said Michael Moore's estate in the Kingdom of Ireland, unto the said Robert Dillon, &c." there should be read before the words "in the Kingdom of Ireland," the names of the counties of Mayo and Kings, as it appeared from the preamble of the deed, that it was the grantor's intention to only convey the lands in those two coun-

ties. More than a century and a half have passed, and the rule laid down in the Moore case remains unchanged, although totally repudiated in some jurisdictions.

It is not necessary that there be any ambiguity before extraneous circumstances may be considered to ascertain the intention of the grantor, legislative or private. There was no ambiguity in the alien contract act. The District Judge in deciding *U. S.* v. *N. P. R'y Co.*, 170 Fed., 498, which was affirmed by the Circuit Court of Appeals in 176 Fed., 706, and is now pending in this court, very aptly said that as the letter of the law had failed to convey a clear meaning, the court was at liberty to consider the general policy of Congress, and other things to aid in solving the doubtfulness.

Likewise it was held in the following cases that in construing a statute, aid may be derived from attention to the state of things as it appeared to the legislature when the statute was enacted:

U. S. v. *U. P. R. R. Co.*, 91 U. S., 72.
Platt v. *R. R. Co.*, 99 U. S., 48.
Smith v. *Townsend*, 148 U. S., 490.
Johnston v. *Morris*, 72 Fed., 890.

It is submitted that from the foregoing decisions, and others cited in the original brief, a rule may be deduced, and must necessarily be deduced, that in construing a statutory grant the courts may look into all surrounding contemporaneous circumstances, including the reports of committees, and all connected therewith, excepting only the words of the legislators uttered in debate on the measure, and

may go back into the history of the subject-matter and all history that tends to throw light on the subject which was embodied in the enactment.

The authority in Congress to grant any part of the public domain comes from the second clause of paragraph 3, Article 4 of the constitution, which says:—

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

While not contending that Congress is without power to give away the public domain under any circumstances, it is submitted that any construction of the language of a land grant, which will relieve Congress of the charge of recklessly and wantonly giving away the trust estate, must be adopted by the courts. The lands in Utah were acquired by conquest from Mexico, and the title confirmed by the Treaty of Guadalupe Hidalgo. The cost to the country was the lives of many of its citizens, the heavy expense of the war and the additional sum of $15,000,000 paid under the terms of the Treaty. In a certain sense then these lands became a trust estate.

Chief Justice Taney in the Dred Scott case on pages 436 and 437 of the report, discusses this power of Congress to dispose of the public domain to mean the power to sell or to dispose of in some way in which a consideration would come back to the people of the country. The Chief Justice was there referring to the lands acquired in the Northwest terri-

tory. Later, and in February, 1859, President Buchanan sent his message to Congress vetoing

> "An Act donating public land to the several states and territories which may provide colleges for the benefit of agriculture and the mechanical arts."

The President quoted from the language of Chief Juctice Taney, and while admitting that it was proper for the Congress to grant lands to the people of a territory, which lands would be embraced within the limits of that territory when it became a state, for the purpose of encouraging education and aiding in its development and spread, yet that could be justified on the ground that there was an element of consideration therefor. See also Message of President Pierce, May 3, 1854, Vol. 5, Mess. & Papers, 247. Therefore while Congress might give in definite quantities, lands from the public domain, to a newly created state, in aid of education or public charities, yet every presumption would be against charging Congress with making a grant without consideration or knowledge of its value or extent.

The government has pursued a very liberal policy toward the new states admitted into the Union, granting in each instance large tracts of land from the public domain, to aid in education, construction of internal improvements, charities, and even in the support of penal institutions, but with only four exceptions (counting the grant to Utah), these grants have been definite and certain in quantity, and as it happens these exceptions all relate to salt springs or saline lands, and will be more specifically mentioned further on. Also whenever the courts have

been called upon to construe these grants as to the quantity or character of the thing granted, it has been invariably held that unless otherwise clearly stated, neither minerals or saline lands nor salt springs are granted.

Morton v. *Nebraska,* 21 Wallace, 660.
U. S. v. *N. P. R'y Co.,* 170 Fed., 498; 176 Fed., 706.
Garrard v. *Silver Peak Mines,* 82 Fed., 578.
Mullan v. *U. S.,* 118 U. S., 271.
Mining Co. v. *Mining Co.,* 102 U. S., 167.
Newhall v. *Sanger,* 92 U. S., 761.
L. L. & G. R. R. Co. v. *U. S.,* 92 U. S., 733.

Wherever there has been a land grant definite in quantity but with location indefinite, and quality not specified, it has been construed to be except known mineral and saline lands, but to include lands not known to be mineral or saline, although so in fact; so that wherever there was a grant of lands not definite in quantity and with the location indefinite and quality not specified, the courts have read into the grant the exception that known mineral or saline lands did not pass thereby, and in numerous cases where slections were made of lands which were known to be mineral and patents issued therefor, on proper action, such patents have been annulled and the ruling made that they did not pass by the grant.

The grants of salt bearing or producing lands were limited to salt springs and adjacent lands, except in the territory of New Mexico and the State of Utah, and with these two exceptions and Indiana and Illinois, were definite in quantity, and with the exception

of Utah and New Mexico were for general state purposes to be determined by the legislators, and were upon conditions relating to their use and alienation. To Ohio was granted certain named salt springs with adjacent lands which amounted in the aggregate to 24,216 acres and the right to alienate and lease was limited. The grant to Illinois was of all salt springs and certain adjacent lands and originally they were not subject to alienation and could only be rented for short terms, but as they proved unprofitable, authority was given to sell them, and in all the state received 121,029 acres under this grant. This was indefinite in quantity until made definite by location, but the salt springs with the surrounding salt licks were known from the earliest white occupation, and before that by the Indians, so that what was indefinite in law was definite in fact.

To Indiana and Alabama were given all salt springs and lands reserved for the use of the same, together with such other lands as might be deemed necessary and proper for working said salt springs, not exceeding in the aggregate thirty-six sections. How many springs were acquired by Indiana and Alabama we are not advised, but each state acquired under its salt springs grant, its full quota of acreage, to wit: 23,040 acres.

To the territory of New Mexico in 1898, was given certain lands for university purposes, and in addition thereto 65,000 acres of non-mineral, unappropriated and unoccupied land to be selected and located as provided in the Act, "together with all saline lands in said territory are hereby granted to the said territory for the use of said university, and

100,000 acres to be in like manner selected for use of an Agricultural College." We are not prepared to admit that it was the intention of Congress to grant to the territory of New Mexico all the saline lands therein for the use of a university, but whether that was true or not, Congress in its last session passed an enabling act for the people of New Mexico, and therein repealed whatever grants they had made of saline lands, except such as had been previously located, and the records of the General Land Office show that 1,622.86 acres of saline lands were selected by the territory under this Act.

Missouri, Michigan, Arkansas, Iowa, Minnesota, Oregon, Kansas, Nebraska and Colorado each received a grant of twelve salt springs with six sections of land for each spring, making a total of 46,080 acres, under the saline grant. Neither of the Dakotas nor Montana, Washington, Idaho, Oklahoma, Wyoming or Nevada received a grant of either saline lands or salt springs. Nor do New Mexico and Arizona under their Enabling Acts acquire any. The land grant to Idaho is peculiar. After making the usual grants of sections sixteen and thirty-six, and some other specified grants, the Enabling Act states that in lieu of grants for internal improvements or swamp or overflooded lands or saline lands, there be granted to the state a total of 400,000 acres for State Normal School, Insane Asylum, State University, &c. It would seem then that the history of the country shows that it was the policy of Congress to limit the quantity of salt producing lands granted to the new states, and also to place restrictions and limitations upon the sale thereof, and when the arid

country was reached the grant of salt springs ceased and no grant of any salt producing property was made, excepting to the territory of New Mexico, and to the State of Utah. It is somewhat remarkable to note that in the states surrounding and contiguous to Utah, namely, Idaho, Wyoming, Colorado, Arizona and Nevada, there were no grants whatever of saline lands or salt springs. Yet at the time of the adoption of the Utah Enabling Act, and for very many years prior thereto, it was known that there existed salt springs, salt ledges and salt in deposits, crystallized, as distinguishable from the rock salt, in Utah, and that according to the statements made in the House of Representatives when the bill was under discussion, there were at that time 31,000,000 acres of land wholly unappropriated and undisposed of in the territory, out of a total area of 52,000,000 acres, of which but 12,000,000 acres at that time had been surveyed.

Congress has been liberal to the new states in providing for educational institutions. In addition to, first section sixteen and afterwards both sections sixteen and thirty-six in each township, liberal donations have been made for institutions of higher learning, universities and agricultural colleges, and while there has been some variation in the quantity given to the several states, yet no such variation as precludes the ascertainment of a practically settled policy on the part of Congress. Nearly all the states received each a donation of seventy-two sections or two townships. Ohio faring a little worse with 69,-120 acres, Minnesota much better with 82,640 acres and Florida better yet with 92,150 acres, while New

Mexico and Arizona each gets 200,000 acres, and Oklahoma gets section thirteen in each township, one-third of which is to be for university purposes, and for a University Preparatory School. Thus it will be seen that it was the policy of Congress to give for university purposes a definite acreage in every instance, except in the territory of New Mexico and the State of Utah, and that definite area was 46,080 acres.

It is said that at one time, many thousands of years ago, a great lake existed, the bed of which was the bed of the present Great Salt Lake, and the Great Salt Lake Desert, the lake having an area of about 2,500 square miles, and the desert an area of about 3,000 square miles, and that this immense lake became reduced by evaporation until its surface did not extend above the lowest part of the ridge which is in some places high and in other places low, but which separates the present Great Salt Lake from the desert west of the same. When that point in recession was reached there became two lakes, and into the westernmost one, emptied no streams whatever, and of course the process of evaporation advanced much more rapidly there than in the Great Salt Lake itself where there are three or four quite considerable streams emptying their fresh water. Geologists claim that this evaporation continued until all of that part of the original lake which covered what is now the Great Salt Lake Desert, became completely dry. (Monograph I, U. S. Geological Survey, Vol. I, entitled "Lake Bonneville," by G. K. Gilbert.) That is exactly the process that has been followed in Utah for many years for procuring commercial salt from

the waters of the Great Salt Lake, and it is just as probable to find salt deposits in the desert as in the evaporating basins along the lake.

The history of Utah itself, and its people, has been prominent before all the people of the Union, and prominent in Congress, since the days of President Buchanan, and there is nothing in that history that warrants the assumption that Congress felt more generous towards the people of Utah than toward the people of the states and territories admitted prior to the admission of Utah.

Congress had never before in its history granted any mineral deposits as such, to any state, public service corporation or individual, and if the exact words embodied in this Act, and which are under discussion here, had been embodied in the land grant to the Union Pacific Railroad Company, or to any other public service corporation or individual, no court would hold that it was the intention to vest thereby what is claimed by the State of Utah to be vested in it by this act, and we venture to say that this court would hold that Congress had no power so to do.

When the Utah Enabling Act came up for discussion in the Committee of the House of Representatives, all of these policies, and all this history, and all this law were known to the members of Congress, and it must be presumed that their intentions towards the people who sought admission to the Union, were governed and influenced and controlled by that knowledge, and it is in view of all these facts that the court must construe the language of

the grant to determine what was the real intention of Congress in respect thereto.

The general intention of Congress, of course, is plain and simple, namely, to deal with Utah substantially as it had dealt with the states admitted since the original confederation, and allowing something for the ever growing liberality of Congress in matters of education and public charities, yet it must be presumed that it was not the intention to treat Utah materially different from its predecessors, and especially not materially different from the immediately surrounding states. It is this intention of Congress that must be determined by this court and that intention must govern.

In *U. S.* v. *Raisch*, 144 Fed,. 486, the court on page 488 uses the following language:

> "In the explanation of a statute, in the endeavor to ascertain its scope and effect, every word must if possible be given some force; but the general intention of the legislature is to be gathered from all of its parts and a construction of its reason and object; that such intention when thus ascertained will prevail over its literal terms, and the law is if possible to be given such a construction as will effect the general purpose for which it was enacted. In the construction of statutes the rules of grammar are less important than the intention of the legislature, and the sense and spirit of the statute prevails over the strict grammatical construction of its words, 'for the letter killeth but the spirit maketh alive.' "

The court in *Hawaii* v. *Mankichi*, 190 U. S., 197, on page 212, says:

> "The books are full of authorities to the effect that the intention of the law making power

> will prevail even against the letter of the statute, or as tersely expressed by Mr. Justice Swayne in *Smythe* v. *Fiske*, 23 Wall., 374-380: 'A thing may be within the letter of a statute, but not within its meaning, and within its meaning though not within its letter. The intention of the law-maker is the law.'"

The court also quotes from *People* v. *Utica Insurance Company*, 15 Johns, 358-381, as follows:

> "A thing which is within the intention of the makers of a statute is as much within a statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the markers;"

and quotes from *Lau Ow Bew* v. *U. S.*, 144 U. S., 47, 59:

> "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and if possible so as to avoid an unjust or absurd conclusion."

The court also quotes from *Plumstad Board of Works* v. *Spackman*, L. R., 13 Q. B. D., 878-887:

> "If there are no means of avoiding such an interpretation of the statute (as will amount to a great hardship) a judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but to my mind a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an Act of Parliament; and unless he is forced to come to a contrary conclusion he ought to assume that it is impossible that the legislature could have so intended."

In *New York Indians* v. *U. S.*, 170 U. S., 1, the court reviewed a number of decisions prior thereto,

in which the language of a statute was held not to be conclusive as to its meaning, and on page 19, says:

> "From this summary of cases it is evident that the language of the granting clause is not conclusive, but the intent of Congress must be gathered from the whole scope of the instrument and the facts to which it was intended to apply."

In *Heydenfeldt* v. *Daney Gold & Silver Mining Company*, 93 U. S., 534, the Nevada Enabling Act was before the court, and where that act granted sections 16 and 36 in each township to the new state for the use of schools, and the language was such as under ordinary circumstances would be considered as granting the same *in presenti*, yet it was held that inasmuch as Nevada had not then been surveyed and these numbered sections could not be definitely located, the grant was not *in presenti*, and that mineral claims located prior to the survey and subsequent to the Enabling Act on what proved to be sections 16 or 36, would take precedence over the grant to the state, and on page 639, the court uses the following language:

> "This interpretation though seemingly contrary to the letter of the statute is really within its reason and spirit. It accords with a wise public policy, gives to Nevada all she could reasonably ask and acquits Congress of passing a law, which in its effect would be unjust to the people of the territory. Besides no other construction is consistent with the statute as a whole, and answers the evident intention of its makers to grant to the state *in presenti* a quantity of lands equal in amount to the 16th and 36th sections in each township."

When the bill was finally adopted the land grant sections, numbers six to thirteen, both inclusive, were as follows:

Section 6. That upon the admission of said State into the Union, Sections numbered Two, Sixteen, Thirty-two and Thirty-six in every Township of said proposed State, and where such section or any part thereof, have been sold or otherwise disposed of by or under the authority of any Act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the Section, in lieu of which the same is taken, are hereby granted to said State, for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior; provided, that the two, sixteen, thirty-two and thirty-six sections embraced in permanent reservation for national purposes, shall not at any time, be subject to the grant nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, Military or other reservation of any character, be subject to the grants or to the indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

Section 7. That upon the admission of said State into the Union in accordance with the provisions of this Act, one hundred sections of the unappropriated lands within said State to be selected and located in legal subdivisions, as provided in Section 6 of this Act, shall be and are hereby granted to said

State for the purpose of erecting public buildings at the Capital of said State, when permanently located, for legislative, executive and judicial purposes.

Section 8. That lands to the extent of two townships in quantity, authorized by the third section of the Act of February twenty-one, eighteen hundred and fifty-five, to be reserved for the establishment of the University of Utah, are hereby granted to the State of Utah for university purposes, to be held and used in accordance with the provisions of this section, and any portion of said lands that may not have been selected by said territory may be selected by said state. That in addition to the above, one hundred and ten thousand acres of land to be selected and located as provided in the foregoing section of this act, and including all saline lands in said state, are hereby granted to said state, for the use of said university, and two hundred thousand acres for the use of an agricultural college therein. That the proceeds of the sale of said lands or any portion thereof, shall constitute permanent funds, to be safely held and invested by said state, and the income thereof to be used exclusively for the purposes of such university and agricultural college, respectively.

Section 9. That five per centum of the proceeds of the sales of public lands lying within said state, which shall be sold by the United States subsequent to the admission of said state into the Union, after deducting all the expenses incident to the same, shall be paid to the said state, to be used as a permanent fund, the interest of which only shall be expended

for the support of the common schools within said state.

Section 10. That the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools, and such land shall not be subject to pre-emption, homestead entry, or any other entry, under the land laws of the United States, whether surveyed, or unsurveyed, but shall be surveyed for school purposes only.

Section 11. The schools, colleges and university provided for in this act shall forever remain under the exclusive control of said state, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes, or of the income thereof, shall be used for the support of any sectarian or denominational school, college or university.

Section 12. That in lieu of the grant of land for purposes of internal improvement made to new states by the eighth section of the act of September fourth, eighteen hundred and forty-one, which section is hereby repealed as to said state, and in lieu of any claim or demand by the State of Utah under the act of September twenty-eighth, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, making a grant of swamp and over-flowed lands to certain states, which grant it is hereby declared is not extended to said State of Utah, the following grants of land are hereby made to said state, for the purposes indicated, namely:

For the establishment of permanent water reservoirs for irrigating purposes, five hundred thousand acres; for the establishment and maintenance of an insane asylum, one hundred thousand acres; for the establishment and mainenance of a school of mines in connection with the university, one hundred thousand acres; for the establishment and maintenance of a deaf and dumb asylum, one hundred thousand acres; for the establishment and maintenance of a reform school, one hundred thousand acres; for establishment and maintenance of state normal schools, one hundred thousand acres; for the establishment and maintenance of an institution for the blind, one hundred thousand acres; for a miners' hospital for disabled miners, fifty thousand acres. The United States penitentiary near Salt Lake City and all lands and appurtenances connected therewith and set apart and reserved therefor are hereby granted to the State of Utah.

The said State ofUtah shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act; and the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislature of the state may provide.

Section 13. That all land granted in quantity or as indemnity by this act shall be selected, under the direction of the secretary of the interior, from the unappropriated public lands of the United States within the limits of the said State of Utah.

The only change in the bill as passed, from what

it was when it reached the committee, is in Section 8, in which several changes were made, but the only one affecting the matter in issue was the changing from 200,000 acres to 110,000 acres, and that was changed by amendment after coming from the committee. The committee made a majority and a minority report and when reported back to the House, was discussed, most of the discussion however being on the religious and moral questions in the territory, yet there was talk about the land grant. The bill was advocated and presented by Mr. Rawlins, delegate from the territory to Congress, and he was asked whether Congress had before that time, when a new state was admitted, granted any such donation of land as that disclosed in this bill. Mr. Rawlins replied giving the acreage granted under the bill, and from those statements not made in the heat of debate, but calmly and as explanatory of the bill, it appears that the committee at least understood that the appropriation was of four sections in each township amounting to 6,042,311 acres, and a direct and additional appropriation of about a million and a half acres, and Mr. Rawlins was asked that if the relative values of the land proposed to be granted to those granted to other states, were taken, would there be much difference, and his answer was that it will give to Utah less in value than has been given to any state admitted in the Union of States. The minority report as to this item was:— "And that there be further appropriated 110,000 acres of land for the support of a University, said 110,000 acres of land to include saline lands to an amount not to exceed

3,000 acres." The language of this clause as adopted is "That in addition to the above, 110,000 acres of land, to be selected and located as provided in the foregoing section of this act, and including all saline lands in said state, are hereby granted to said state for the use of said University." It is submitted that the words "and including all saline lands in said state" are in qualification or modification of Section 13 of the Act, and that the grant is of 110,000 acres of land to be selected and located from the agricultural lands, including all the saline lands in the state but excluding all other mineral lands. No other construction could be reconciled to the evident intention of the act itself and of the members of the committee that the donation should be of a specific amount, and that is in accordance with the policy of the government at all times theretofore, with the single sole exceptions of Illinois and possibly the territory of New Mexico. If it was intended to grant all of the saline lands in the state, the word "including" was entirely superfluous and misleading. This word "including" has received constructions from the courts, and it would seem that it is given about as many meanings as "and" and "or."

In *Meyer* v. *Johnston*, 53 Ala., 237, where the charter of a corporation provided that six directors, including the president, should constitute a quorum for all business,—it was held that quorum did not necessarily have to include the president, but that six directors would be a quorum, and that five other directors and the president would be a quorum.

The constitution of Oklahoma provided that "the governor and other elective state officers, including the Justices of the Supreme Court, shall be liable and subject to impeachment" &c. It was held in *Maben* v. *Rosser*, 103 Pac., 674, that this provision of the constitution specified that the governor and other elective state executive officers, that is officers of the same branch of the government as the governor, should be subject to impeachment, and in addition thereto only the Justices of the Supreme Court, not extending to any other judicial officers.

In *Peppers Estate*, 154 Pa., 340, a bequest "to the Academy of Pennsylvania Fine Arts, $50,000 inclusive of the note of the academy," meant that the academy should receive $42,000 plus a note for $8,000 of the academy, which the testator held.

If there should be more than 110,000 acres of land in Utah which were unappropriated at the time of the passage of the Enabling Act, and which were saline, then they could not be included in the 110,000 acres, and in whichever way this language is taken there is an ambiguity and an uncertainty that warrants the court in looking into the surrounding circumstances and conditions that will test the intention of Congress, and it is respectfully submitted that the intention of Congress was to allow the selection of the 110,000 acres of land to be made from agricultural lands and saline lands, or else (and what is far less likely) it was intended to grant 110,000 acres of agricultural lands, and all of the then known and unappropriated saline lands in the state. It is not for a moment to be presumed that

the government intended to make a blanket grant of all saline lands, which of course would include salt deposited from evaporation, salt in the ledge or rock and salt springs, and the grant to take effect at once and to cover and convey all lands that might thereafter develop to be saline lands, to the absolute exclusion of private locations on salt producing properties in a state covering 52,000,000 of acres, of which but 12,000,000 at that time had been surveyed, and probably little, if any more, prospected for salines.

The part of Section 8, after the first period, gives to the state 110,000 acres of land "to be selected and located as provided in the foregoing section of this Act." Taking the foregoing sections and Section 13, and the law, as above stated, that mineral lands are always excluded from a grant, unless specifically mentioned, it is respectfully submitted that the clause in question should be read as follows:—

> "That in addition to the above, 110,000 acres of land to be selected and located in legal subdivisions of not less than quarter sections of the unappropriated lands within said state, not including lands embraced in permanent reservations for national purposes, nor lands embraced in Indian, military or other reservations of any character, nor mineral lands, and including all saline lands, are hereby granted to said state for the use of said University."

There is still another construction of the language used in this Act. Up to 1896 grants of this character were of "salt springs" which is synonymous with "salt licks." *Indiana* v. *Miller*, 13 Fed. cases, 25.

Saline as an adjective means "consisting of salt or constituting salt, or pertaining to or characteristic of salt; salty." (Cent. Dict.) "Consisting of salt or containing salt; of the quality of salt; salty." (Webster.)

As a noun it means "a salt spring or place where salt water is collected in the earth; a salt marsh or pit." (Cent. Dict.) "A salt spring; a place where salt water is collected in the earth." (Webster.)

Congress seems to have used the term "saline lands" as synonymous with "salt springs" in every instance where the former term was used. Mr. Justice Davis in *Morton* v. *Nebraska*, 21 Wall., 660-667, gives the early history of the salt springs legislation by Congress. Under the legislation referred to by Justice Davis, the surplus salt springs not conveyed to the states were reserved for sale until the passage of the Act of 1877, 19 Stat. L., 221, entitled "An act providing for the sale of saline lands," whereby the formerly reserved "salt springs," under the name of "saline lands," became saleable. (See Rev. Stat. Public Lands.)

Also in the Enabling Act for Montana, Washington and the Dakotas, 25 Stat. L., 676, Sec. 17, grants of land are made "in lieu of any grant of saline lands." The only grants of "saline lands" theretofore made that we can find are designated as "salt springs." Similar language is used in the Enabling Acts of Idaho and Wyoming. Therefore in all prior Acts of Congress "saline land" means "brine soaked land." See also Vol. XI, Jefferson's Writings, pp. 194, 387.

If Congress intended to give all that existed in Utah of one character of the public domain, did it intend to do more than it had done in the case of Illinois, and that too when the extent of the grant in Utah was unknown and that in Illinois was well known, and especially when a different policy had been followed since the Illinois grant? Is not the expression "saline lands" synonymous with "salines" which is, in turn, synonymous with "salt springs"?

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1910

MONTELLO SALT COMPANY,
Plaintiff in Error,
v.
THE STATE OF UTAH,
Defendant in Error.

No. 136.

BRIEF FOR DEFENDANT IN ERROR

This suit involves the construction of the word "including" in Section 8 of the Act of Congress entitled "An Act to enable the people of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the Original States," approved July 16, 1894, commonly known in Utah as the Enabling Act. (28 U. S. Statutes at Large 107.) The material portion of that section is as follows:

> "That lands to the extent of two townships in quantity, authorized by the third section of the act of February twenty-one, eighteen hundred and fifty-five, to be reserved for the establishment of the University of Utah, are hereby

> granted to the state of Utah for university purposes, to be held and used in accordance with the provisions of this section; and any portions of said lands that may not have been selected by said territory may be selected by said state. That in addition to the above, one hundred and ten thousand acres of land, to be selected and located as provided in the foregoing section of this act, and *including* all saline lands in said state, are hereby granted to said state, for the use of said university."

We shall, first of all, call attention to the definition given this word by the lexicographers. Then we shall point out how the word is sometimes used in the sense of "also," although such use is not in conformity with the meaning given in the dictionaries. Our contention will be that Congress used the word (1) in its true and proper sense, as defined by the lexicographers; or (2) in the sense of "also." Many, if not all, of the arguments we shall present are equally pertinent in support of either meaning. It will, therefore, be unnecessary to present separate lines of argument.

I.

The word "include" is derived from the Latin verb *includo,* which means to shut up, to enclose. By consulting the dictionaries we find that "include" has two meanings, one of which is the same as that of the Latin word, while the other is the same as that of the word "embraces." The first meaning is used in the expression, "The thoracic cavity includes the heart;" and the second in the expression "Congress includes the Senate

and the House of Representatives." Webster states the meanings thus:

> "1. To confine within; to hold; to contain; to shut up; as, the shell of a nut *includes* the kernel; a pearl is *included* in the shell.
>
> 2. To comprehend, as a genus the species, the whole a part, an argument or reason the inference; to contain; to embrace; to relate to; to pertain to; as, Great Britain *includes* England, Scotland and Wales."

II.

We contend and maintain that Congress used the word "including" in the sense thus defined by the dictionaries. It will be observed that Congress, after first disposing of the two townships, introduces the sentence under consideration with these words, "That in addition to the above." This clearly indicates that Congress has in mind an additional grant. These words, standing alone, plainly indicate that a further grant is about to be made, but they afford no clue as to the nature of it. But after declaring at the outset its intention to grant something in addition to the two townships, Congress at once proceeds to point out what further grant is intended. It mentions, first of all, 110,000 acres of land—common, ordinary land. By these words alone it did not more than specify the quantity of this kind of land which it intended to give. The grant was a floating one. It was indeed a grant of a portion of the public domain, but an undesignated and undefined portion. To make the grant effective, it became necessary to point out how the 110,000 acres should be selected and located, which Congress at

once proceeds to do. The land is "to be selected and located as provided in the foregoing section of this act;" in other words, it is to be selected in such manner as the legislature of the state, with the approval of the Secretary of the Interior, may provide. Having done this, Congress passes to the consideration of a different class of lands, viz., saline lands, using these words to express the idea which it has in mind: "and including all saline lands." Now, when it used the word "including," what idea had Congress in mind? Did it intend by the use of this word that the saline lands were to be included in the 110,000 acres? Or did it intend that the saline lands were to be included in *what was being given in addition to the two townships?* Beyond all question Congress used the word "including" to express some thought then present in mind. What, then, was this thought?

We submit that what Congress had in mind was the grant of lands then being made in addition to the two townships; and that when it used the word "including," it used that word to express the idea that the saline lands were to be included in *that which was additional to the two townships.* This is shown by the very words employed to introduce the sentence under consideration, "That in addition to the above." The conjunction "that" has reference to the ordaining clause at the beginning of the Enabling Act, reading: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled." To avoid needless repetition, these words were omitted in subsequent portions of the Act; but in this particular instance,

as well as in other instances to be found in the Act, it is apparent that when Congress uses the conjunction "that," as it frequently does, it intends there should always be read before that conjunction, as though actually inserted, the clause already quoted, "Be it enacted," etc. So that, in the sentence under consideration, Congress started out by saying, in substance and effect, "Be it further enacted that in addition to the above."

As already stated, it is apparent from this language that Congress had in mind something in addition to the two townships. It is apparent that a further grant is about to be made. Something in addition to the two townships is about to be given. An additional something is in the mind of Congress; and when Congress, after first granting 110,000 acres, and after first pointing out how that grant shall become effective, used the phrase "and including all saline lands," is it not apparent that what Congress had in mind was that the saline lands were to be included in *this additional something?* In other words, the word "including" has reference to the introductory words "in addition to the above,"—not to the clause "110,000 acres of land." Say that Congress, when it began to mention the saline lands, had repeated the words to be found at the beginning of the sentence, thus making the sentence read: "That in addition to the above, 110,000 acres of land, to be selected and located as provided in the foregoing section of this act, and including, in addition to the above, all saline lands in said state, are hereby granted," etc. Would it not have been clear that Congress used the word "including" to express the idea that the saline

lands were to be included *in the grant of lands then being made in addition to the two townships?* Now, note the italicized words in the following sentence: "That in addition to the above, 110,000 acres of land, to be selected and located as provided in the foregoing section of this act, and including *in that which is additional to the two townships* all saline lands in said state, are hereby granted," etc. Had these words been used, it would have been clear beyond all controversy that Congress intended the saline lands to be included in *that which was to be in addition to the two townships.*

For reasons which we shall presently state, we contend and maintain that Congress used the word "including" to express the idea contained in the italicized words of the sentence above quoted, which in a slightly different form we now repeat: "That in addition to the above, 110,000 acres of land, to be selected and located as provided in the foregoing section of this act, and including *in what is in addition to the two townships* all saline lands in said state, are hereby granted," etc. In other words, Congress employed an elliptical phrase, leaving the reader to insert in his mind's eye the italicized words, which were omitted to avoid prolixity, because the idea contained in them is essentially the idea contained in the introductory words, "in addition to the above."

III.

The word "including" is used to express various meanings. Take a sentence like this: "I have proxies from all of the stockholders, including X." Here the

last two words are really unnecessary. If I have proxies from all of the stockholders, I necessarily have one from X, if he is a stockholder. But X may at one time have openly declared he would never give a proxy to any one. The words are therefore inserted because the speaker anticipates that a doubt may arise whether he really means that he has proxies from all the stockholders. The word is here used in its proper sense.

But let us assume that X's standing as a stockholder is in doubt. He claims to be such, but the corporation denies it. If then the expression is used: "I have proxies from all of the stockholders, including X," the speaker realizes there is a doubt as to X's status. He therefore inserts the words "including X" to indicate that, although X's standing as a stockholder is in doubt, nevertheless the speaker has a proxy from him too. It is apparent that "including" is here used in a sense closely akin to "also."

Take this sentence: "Every car in the train, including the locomotive, was derailed." Here the speaker thinks some doubt may arise whether "car" is broad enough to include "locomotive." Whether in a technical sense the former is or is not the equivalent of the latter, the speaker wants it specifically understood that he is using the word in this sense. He therefore expresses this idea by saying "Every car in the train, including the locomotive, was derailed." It is apparent, however, that "including" is here used in a sense similar to "also."

Take this sentence: "This picture, including the frame, came over in the Mayflower." "Picture" is some-

times used to mean the picture proper; sometimes to mean both the picture and the frame, although this use of the word is not warranted by the dictionaries. In the above sentence the speaker wishes it understood that he uses the word to mean both picture and frame. Here again "including" is used in a sense bordering on "also."

If, then, this word has the meanings above spoken of, we ought to be prepared to find it used in the sense of "also." Such indeed is the case. Take, for example, such expressions as these: "I gave all of my law books, including my office furniture and fixtures, to my son;" "I will sell you this watch, including this gold chain, for $100;" "The house, including all the furniture, was consumed by fire;" "I will sell you 200 acres of choice farming land, including 200 shares of stock in the Jordan Canal Company;" "The whole of Blackacre, including a right of way over Whiteacre, was mortgaged to the bank;" "I will sell you an automobile, including an extra pair of tires;" "All of the Rocky Mountain states, including portions of Kansas and Nebraska, embrace large tracts of arid land;" "You may take to the jury room the written instructions of the court, including all papers and exhibits which have been received in evidence;" "Every mine in Utah, including many in Nevada and Montana, would be compelled to close down if the price of the precious metals should be reduced;" "Every sheep owner in Utah, including many in Wyoming and Idaho, was in favor of storing this year's wool clip;" "I will sell you a full set of the United States reports, including

a digest, for $200;" "It is ordered and adjudged that the plaintiff recover from the defendant the sum of $1,000, including interest thereon at the rate of eight per cent per annum from the date hereof until paid;" "I bequeath unto my wife absolutely all my ready money, including money to an amount not exceeding $500 in the hands of my banker."

Here are a few illustrations selected at random from some appropriation acts passed by the Fifty-eighth Congress:

> "Regular supplies of the Quartermaster's Department, including their care and protection, consisting of stoves and heating apparatus required for heating offices, hospitals, barracks and quarters, and recruiting stations; . . . of fuel and lights for enlisted men, including recruits, guards, hospitals, storehouses, and offices, and for sale to officers, and including also fuel and engine supplies required in the operation of modern batteries at established posts; . . . of forage in kind for the horses, mules, and oxen of the Quartermaster's Department at the several posts and stations and with the armies in the field, . . . including bedding for the animals." (33 U. S. Stat. at Large 834.)
>
> "Continuing the work of providing for the proper shelter and protection of officers and enlisted men of the Army of the United States lawfully on duty in the Philippine Islands, including the acquisition of title to building sites when necessary, and including also shelter for the animals and supplies, two hundred and thirty thousand dollars." (Id. 836.)
>
> "For construction and repair of hospitals at military posts already established and occupied, including the extra duty pay of enlisted men employed

on the same, and including also all expenditures for construction and repairs required at the Army and Navy Hospital at Hot Springs, Arkansas." (Id. 838.)

"For the proper care and treatment of epidemic and contagious diseases in the Army or at military posts or stations, including measures to prevent the spread thereof, and the payment of reasonable damages, not otherwise provided for, for bedding and clothing injured or destroyed in such prevention." (Id. 838.)

"Manufacture or purchase of metallic ammunition and the materials therefor for small arms for current needs and reserve supply, and ammunition for reloading cartridges, including the cost of targets and material for target practice, ammunition for burials at the National Home for Disabled Volunteer Soldiers and its several Branches, including National Soldiers' Home in Washington, District of Columbia . . . and for firing the morning and evening gun at military posts . . . including material for cartridges, bags, reworking obsolete powder, and similar items, and marksmen's medals and insignia for all arms of the service, one million two hundred and fifty thousand dollars." (Id. 840.)

"Investigating the history and habits of insects injurious and beneficial to agriculture, horticulture, and arboriculture; ascertaining the best means of destroying those found to be injurious, including an investigation into the ravages of insects affecting field crops." (Id. 876.)

"Care of library, including the purchase of books, photographs, prints, manuscripts, and periodicals." (Id. 1092.)

"For transportation of troops, including ferriage and the expense of the recruiting service." (Id. 1114.)

"For every expenditure requisite for and incident to the survey of the coasts of the United States

and of coasts under the jurisdiction of the United States, including the survey of rivers to the head of tide water or ship navigation." (Id. 1173.)

"For surveys and necessary resurveys of the Atlantic and Gulf coasts of the United States, including the coasts of outlying islands under the jurisdiction of the United States." (Id. 1174.)

"For surveys and necessary resurveys of the Pacific coast, including the Hawaiian Islands and Alaska and other coasts on the Pacific Ocean under the jurisdiction of the United States." (Id. 1174.)

"For the purchase of necessary books for the library, including directories and professional and scientific periodicals needed for statistical purposes." (Id. 1187.)

"For the administration and protection of the Yellowstone National Park, to be expended by and under the direction of the Secretary of the Interior, including two thousand five hundred dollars for maintenance of buffalo." (Id. 1188.)

Here is an illustration taken from the act granting a right of way through the public lands to the Arkansas Valley Railway Company:

"Said right of way is granted to said railway company to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain and military reservation at Fort Lyon, including grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turntables, cattle yards and water stations, to the amount not exceeding ten acres, not mineral lands, for each station, and for not more than one station in every ten miles." (18 Stat. at Large 274.)

Compare this with the following language in the act granting to railroads in general a right of way through the public lands:

> "That the right of way through the public lands of the United States is hereby granted to any railroad company . . . to the extent of one hundred feet on each side of the central line of said road; . . . also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turntables and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road." (18 Stat. at Large 482.)

In none of these sentences is "including" used in strict accordance with its dictionary meaning, but in the sense of "also." Yet similar expressions are heard every day in the year. Even men of learning, trained to exactness of thought and accuracy of expression, not infrequently use the word in this sense. Nor is judicial authority upon this point lacking. A Federal court has said that Congress not infrequently uses "including" in the sense of "also." In U. S. v. Pierce, 147 Fed. 199, the Circuit Court of Appeals of the Second Circuit was called upon to determine in what sense Congress used that word in the following paragraph of the Tariff Act of 1897, which placed the articles therein enumerated on the free list:

> "699. Wood: Logs and round unmanufactured timber, including pulp-woods, firewood, handle-bolts, shingle-bolts, gun-blocks for gun-stocks, rough-hewn or sawed or planed on one side, hop-

poles, ship-timber and ship-planking; all the foregoing not specially provided for in this act."

Upon this point the court said:

"The argument that by the use of the word 'including,' preceding the words 'pulp-woods, fire-wood,' etc., in paragraph 699, Congress intended to put only such pulp woods on the free list as should also be round unmanufactured timber, is not persuasive. We think the word 'including' was used as the equivalent of 'also,' *a sense in which it is frequently employed in tariff acts.*"

See also Hiller v. United States, 106 Fed. 73, where in construing a Federal statute "including" was held to mean "also."

In In re Goetz's Will, 75 N. Y. Supp. 750, a testator by his will bequeathed to his wife "all my personal property, including furniture, plate and household effects." It was contended by certain beneficiaries under the will that this meant merely all of the furniture, plate and household effects, and did not embrace all the testator's personal property. But the court held that the testator intended to give all of his personal property to his wife, and in discussing the meaning of "including," they say:

" 'Including' is not a word of limitation, rather is it a word of enlargement, *and in ordinary signification implies that something else has been given beyond the general language which precedes it.*"

This is not the meaning as given in the dictionaries, and the court probably did not intend to be understood as saying so. What the court probably meant was that as *commonly* used "including" has this meaning.

IV.

We now address ourselves to the inquiry as to the sense in which the word is used in the phrase under consideration. On February 21, 1855, Congress passed an act (10 U. S. Statutes at Large 611) which reserved two townships in Utah for the establishment of a university, and provided that this land should be selected under the direction of the Legislature and disposed of as the Legislature might direct. Upon turning to Section 8 of the Enabling Act, we find that Congress grants to the State the two townships thus reserved, aud authorizes the state to select any portion which may not have been selected by the territory. Then follows this sentence: "That in addition to the above, one hundred and ten thousand acres of land, to be selected and located as provided in the foregoing section of this act, and including all saline lands in said state, are hereby granted to said state, for the use of said university." Now, it is to be observed that in this sentence Congress has two different kinds of lands in mind: (1) 110,000 acres of undesignated and undefined lands; and (2) all saline lands. Whether it intended the saline lands to be a part of the 110,000 acres or not, it is apparent that it intended to give all of the saline lands, for the language used is not "and including any saline lands," but "and including all saline lands." Bearing this in mind, let us analyze more closely the sentence under consideration. We find, first of all, that there is a floating grant of 110,000 acres. The grant, therefore, is a grant of an undesignated portion of the public domain, which comprised an area many times greater than

the 110,000 acres; for in addition to this grant, Congress gave 100,000 acres for public buildings, 500,000 for the establishment of water reservoirs for irrigation purposes, 100,000 for an insane asylum, 100,000 for a school of mines, 100,000 for a deaf and dumb asylum, 100,000 for a reform school, 100,000 for state normal schools, 100,000 for an institution for the blind, 50,000 for a miner's hospital, to say nothing of the grant for the public schools. Now, only an undesignated portion of the whole being given, it of course became necessary to point out how the grant should be made certain; and in the very breath granting the 110,000 acres Congress provides how they shall be selected. They are "to be selected and located as provided in the foregoing section of this act." Up to this point not a word is said as to the saline lands. Congress first of all makes an absolute and unequivocal floating grant of 110,000 acres and at once provides how the land shall be selected and located. Then having made this grant and having pointed out the manner of selection, it proceeds to dispose of the saline lands by saying "and including all saline lands in said state." Now, it is significant that Congress, having specially pointed out how the 110,000 acres shall be selected and located, *makes no provision for the selection and location of the saline lands.* And why? Because it granted all such lands, irrespective of their area or locality. Being a grant of the whole and not of a part, it was unnecessary to specify how they should be selected or located. No matter where located, they pass to the state. The moment certain lands are determined to

be saline in character, then Section 8 of the Enabling Act, *ex proprio vigore,* vests the title thereto in the state. No patent is necessary. The Enabling Act itself passes the title. To select and locate lands presupposes the existence of a larger tract from which selection and location are to be made; but in the very nature of things, when the grant is of all and not of a part, selection and location become superfluous terms.

V.

If it was the intention of Congress to include the saline lands in the 110,000 acres, then the phrase "and including all saline lands in said state" is awkwardly and ungrammatically placed. If, on the other hand, it was the intention to give all the saline lands in addition to the 110,000 acres, then the clause is properly and grammatically placed. The proper and grammatical place for the insertion of a phrase expressing the idea that the saline lands are to be a part of the 110,000 acres, is immediately following the words mentioning the 110,000 acres and preceding the clause which points out the manner of their selection. Thus, "That in addition to the above 110,000 acres of land, including all saline lands in said state, to be selected and located," etc. To make a floating grant of land followed immediately by a clause specifying the manner of selection, and then to introduce a phrase limiting or qualifying, not the manner of selection, but the thing granted, is in flagrant violation of good usage. If Congress really intended to qualify the grant of the 110,000 acres by giving the state the right to select

saline lands as a part of the 110,000 acres, the elementary rules of grammar demand that the words explaining or qualifying the thing granted should be placed in juxtaposition to the thing granted—not after a clause which deals with the selection and location of the granted lands.

On the other hand, if it was the intention to grant the saline lands in addition to the 110,000 acres, then the phrase in question is placed just where ordinary usage requires it to be placed. Congress having made a floating grant of 110,000 acres, and having pointed out the manner of the selection and location of this land—which was necessary to make the grant effective—then proceeds to grant something additional. The phrase is placed where everyone would expect it to be placed when the intention is to grant something in addition to the 110,000 acres. Nothing at all is said as to the selection or location of the saline lands, because all such lands being given, selection and location were unnecessary.

The law maker is presumed to know the rules of grammar.

U. S. v. Goldenberg, 168 U. S. 95, 103.

VI.

It is a significant fact that Congress used the word "all" in the phrase "and including all saline lands." If, as the plaintiff in error maintains, it was intended to give the state the right to select saline lands as a part of the 110,000 acres, should we not expect "any" instead of "all" to be used? Where something is given and the intention is that the donee shall have the right to select

a portion of the gift, "any" is the natural and proper word to be used. If, for example, a person is giving away two hundred books and intends that the donee may select as a part of the number as many of Dickens' works as he may wish, the donor would not say: "I will give you two hundred books, including all of Dickens' works, to be selected by you within twenty days." On the contrary he would say: "I will give you two hundred books, including any of Dickens' works, to be selected by you within twenty days." Where, as in the example just put, a party *may* but *need not* select something as a part of the gift, it is unusual to use the word "all." That word, meaning as it does that everything of the kind mentioned is included, *negatives the idea of selection.* If the intention is that all of Dickens' works *must* form a part of the two hundred books, then it would be proper to say, "I will give you two hundred books of my library, including all of Dickens' works, to be selected by you within twenty days." In such case the donee has no right of selection so far as Dickens' works are concerned. He must take them as a part of the gift. His right of selection is limited to the books over and above Dickens' works. But where the intention is that a party *may* select some designated thing as a portion of the gift, "any" is the appropriate word to give expression to that intention. If, for example, in the phrase under consideration, Congress, intending to give to the state the right to select as many acres of saline lands as the state desired, but not intending that all of the saline lands must be selected as a part of the 110,000 acres, had placed the phrase where it

properly belongs, we should expect it to have read: "That in addition to the above, 110,000 acres of land, including *any* saline lands," etc. But if it was the intention to grant *all* the saline lands in addition to the 110,000 acres, we certainly should not expect the grant to be in these words, "That in addition to the above, 110,000 acres of land, to be selected and located as provided in the foregoing section of this act, and *any* saline lands," etc. In order to convey all of the saline lands, it was necessary to use the only word in the English language by which this could be done, viz., "all." This is precisely the word Congress employed. We therefore find that Congress deliberately selects the word designed to convey the idea that the right of selection is excluded, and deliberately rejects the word designed to convey the idea that the saline lands *may* be selected as a part of the 110,000 acres. This is a consideration which cannot be overlooked.

VII.

It is a fact of great significance that Congress omits the word "therein" in the phrase "and including all saline lands." If it really was the intention to include the saline lands in the 110,000 acres, it would have been the most natural thing in the world to have made use of that adverb by saying "that in addition to the above, 110,000 acres of land, to be selected and located as provided in the foregoing section of this act, and including therein all saline lands in said state." If this adverb had been thus used, it would probably have been ap-

parent, notwithstanding the awkward and ungrammatical position of the phrase, that Congress intended that the state might select saline lands as a part of the 110,000 acres. The absence of this word is significant.

Let us suppose that a lawyer having a library of fifteen hundred volumes wishes to will five hundred volumes to his son A, with the right of selecting as a part of the five hundred volumes whatever text books are in the library. He would not be apt to give expression to his intention in such language as this: "I give of my law library to my son A, five hundred volumes, to be selected as he pleases, and including all of my text books." By inserting, however, the adverb "therein," so as to make the sentence read: "Of my law library I give to my son A five hundred volumes, to be selected as he pleases, and including therein all of my text books," we may infer, notwithstanding the ungrammatical construction of the sentence, that the idea is to give five hundred volumes in all, with the right on the part of A to select as a part of the five hundred volumes as many text books as he desires. Even if the testator had omitted the conjunction "and," had substituted "any" for "all," and had placed the phrase where it properly belongs, it would still be more natural to insert than to omit the adverb "therein," so as to make the sentence read: "Of my law library, I give to my son A five hundred volumes, including therein any of my text books, to be selected as he pleases."

Even with the adverb omitted in the sentence last quoted the testator's intention would probably not be

open to contention. But if the testator, in language similar to the Enabling Act, should say, "Of my law library, I give to my son A five hundred volumes, to be selected as he pleases, and including all of my text books," everyone would regard the omission of the adverb "therein" as indicating that the testator intended to give his text books in addition to the five hundred volumes. The phrase "and including all of my text books" not being where it belongs—being separated from its proper position by the clause "to be selected as he pleases"—and being just where we would expect it if the intention is to give the text books in addition to the five hundred volumes, the use of the adverb "therein" is necessary to connect the text books with the five hundred volumes.

The same reasoning holds true with the phrase under consideration. We have a right to expect that Congress, having misplaced the phrase "and including all saline lands in said state;" having improperly allowed the clause "to be selected and located as provided in the foregoing section of this act" to intervene; and having, moreover, placed the phrase just where it would be placed if the intention was to grant the saline lands in addition to the 110,000 acres—we have a right to expect that under these circumstances Congress would have used this simple adverb to connect the saline lands with the 110,000 acres, if, indeed, it was the intention to include those lands in the 110,000 acres. The absence of this adverb must, therefore, be regarded as significant.

VIII.

Of still greater significance is the use of the conjunction "and" in the phrase "and including all saline lands." No other word in the English language is used more frequently than this. No other word in our language is simpler or more readily understood. Of this word it cannot be said that it has a double meaning. It is used in one sense, and in one sense only. Therefore, no ambiguity can ever arise from its use. It is *always* employed to express *the relation of addition.*

Therefore, when Congress used this word in the phrase under consideration, it cannot be said that a word susceptible of two constructions was used. It cannot be said that Congress did not know what this simple word meant. It cannot be said that it was used in a sense other than its ordinary one. If, then, it is always used to express the relation of addition, how can it be said that Congress on the occasion in question used it in any other sense? We have already seen that in the sentence under consideration Congress had two distinct, separate classes of land under consideration. One was a portion of the unappropriated public domain, amounting to 110,000 acres, undesignated, unlocated and of no specified kind; the other was of a specified kind, viz., all saline lands. Now, as already pointed out, Congress first of all made a floating grant of 110,000 acres, coupling this grant with a clause which pointed out the manner of selection. The subject of the sentence was complete, and nothing remained but to add the predicate. If the clause, "and including all saline lands in said state," were entirely strick-

en out, the sentence would still be complete. But what does Congress do after it specifies the first class of land above mentioned and points out the manner of its location and selection? It passes to another matter, and speaks of the second class of land, introducing this phrase with the conjunction "and." Clearly it used this word in its ordinary meaning. And, the only meaning it has in the English language being to express the relation of addition, clearly it must have been employed to mean that something in addition to the 110,000 acres was to be granted. To say that by this phrase Congress intended to include the saline lands in the 110,000 acres, is wholly to ignore this plain and simple conjunction. If the saline lands are included in the 110,000 acres, this conjunction altogether loses its significance. It expresses no thought, no idea, no purpose whatever. It is senseless—a meaningless jargon.

If the plaintiff in error's position is correct, we must say that Congress was either ignorant of the meaning of the word "and," or ignorant of the simplest and most elementary rules of grammar. But to say that Congress was ignorant of the meaning of "and" is absurd; and to say that Congress used the conjunction in violation of grammatical rules is to ascribe to that body an appalling ignorance of the most ordinary rules for the use of its mother tongue.

IX.

What would the situation be if it should turn out that the saline lands in the state exceed 110,000 acres? In this

suit alone, the lands in controversy approximate 40,000 acres, or in other words a tract about six miles in width and about twelve miles in length. It is, therefore, by no means improbable that the saline lands in the whole state exceed 110,000 acres. Upon the admission of other states to the Union, Congress made large grants of saline lands or salt springs. When Minnesota was admitted it was provided in the Enabling Act (11 U. S. Stat. at Large, 166) "that all salt springs within said state not exceeding twelve in number, with six sections of land adjoining or as contiguous as may be to each, shall be granted to said state for its use; the same to be selected by the governor thereof within one year after the admission of said state." A similar grant was made to Kansas, (12 U. S. Stat. at Large, 126.) A similar grant was made to Colorado (18 U. S. Stat. at Large, 474), the only difference being that the selection was to be made by the governor within two years. A similar grant was made to Iowa (5 U. S. Stat. at Large, 789), the only difference being that the selection was to be made by the Legislature within one year after the admission of the state. A similar grant was made to Wisconsin (9 U. S. Stat. at Large, 56), the only difference being that the selection was to be made by the Legislature within one year after the admission of the state. In each of these grants, it will be observed that six sections of land were given with each salt spring, or seventy-two sections in all, which in area amount to 46,080 acres. In giving six sections for each spring, Congress no doubt regarded this area as necessary to preserve the springs.

Having made large grants of similar lands the acreage of which ran up into the thousands, it is by no means improbable that Congress appreciated the fact that the saline lands might exceed 110,000 acres. We have already seen that Congress intended to give *all* saline lands, regardless of their area or locality. But to say that Congress intended to limit the area to 110,000 acres is a contradiction in terms. This consideration, therefore, renders it all the more apparent that the construction urged by the plaintiff in error is erroneous.

X.

Note the italicized words in the phrase under consideration: "and including all saline lands *in said state.*" The insertion of these words indicates very plainly that the saline lands are given in addition to the 110,000 acres. If, as contended by the plaintiff in error, the saline lands are included in the 110,000 acres, what occasion could there have been for the insertion of these italicized words? Beyond any question it was the intention of Congress that the 110,000 acres should be selected from lands within the state. This state has an area of 84,970 square miles, or 54,380,800 acres. The 110,000 acres have to be selected and located out of the 54,380,800 acres, or more accurately speaking, from such portion as still remains a part of the unappropriated public domain. This is to be done in such manner as the legislature, with the approval of the Secretary of the Interior, may provide.

Now, if it be true that the 110,000 acres must be selected from the unappropriated public domain *within the*

state, and if it also be true that the saline lands are included in the 110,000 acres, it follows as a necessary corollary that only saline lands *within the state* can be selected. If, then, we adopt the hypothesis that it was the intention to include the saline lands in the 110,000 acres, we are driven to the conclusion that it was wholly unnecessary to add these italicized words: "and including all saline lands *in said state.*" Under this hypothesis we would expect these words to be omitted instead of being inserted. If the selection of the 110,000 acres is confined to lands within the state, and if the saline lands form a part of this acreage, it was tautology to add the words "in said state." Their insertion was wholly unnecessary and an infraction of the rules of rhetoric.

If, on the contrary, it was the intention to grant the saline lands in addition to the 110,000 acres, no such criticism can be made. We would expect these words to be inserted instead of being omitted. If it was in the mind of Congress to grant 110,000 acres and all saline lands besides, we would expect to see inserted the words "in said state." Their very presence, therefore, indicates that all such lands within the state are given in addition to the 110,000 acres.

XI.

The very fact that we find Section 13 inserted in the Enabling Act supports our construction. That section reads:

> "That all land granted in quantity or as indemnity by this act shall be selected, under the direction of the secretary of the interior, from the unappro-

priated public lands of the United States within the limits of the said state of Utah."

The only lands not granted in *quantity* are the saline lands. They constitute a grant of land by *kind* or *class*, not by quantity. When Congress, therefore, said that all lands granted in quantity should be selected from the unappropriated public domain within the limits of the state, its language shows that Congress had in mind a distinction between lands granted in quantity and lands granted in kind; and the saline lands being the only lands granted in kind, it is clear that Congress had those lands in mind when it drew this distinction. It will be observed that in Section 13 Congress says that lands granted in quantity or as indemnity shall be selected from the unappropriated public lands *within the limits of the State of Utah.* It was unnecessary to take this precaution in reference to the saline lands, because the phrase dealing with those lands specifically says, "and including all saline lands *in said state.*" The fact, then, that Congress in Section 13 draws this distinction between lands granted in quantity and in kind, and takes the precaution to say that all land granted "in quantity or as indemnity" shall be selected from the unappropriated public domain in the State of Utah, shows that Congress was conscious that it had made a grant of lands in kind, viz., saline lands, and had speecifically said that the grant should be confined to such lands " in said state." But under the construction contended for by plaintiff in error there was no grant of any lands in *kind;* only a grant in *quantity.*

XII.

If the saline lands are included in the 110,000 acres, then this is the first and only instance where Congress, in dealing with such lands, included them in another land grant. They have always been dealt with separately. On the admission of Alabama to the Union, there was given that state "All salt springs within the said territory, and the lands reserved for the use of the same, together with such other lands as may, by the President of the United States, be deemed necessary and proper for working the said salt springs, not exceeding in the whole the quantity contained in thirty-six entire sections." 3 U. S. Statutes at Large 491.

To Arkansas: "All salt springs, not exceeding twelve in number, with six sections of land adjoining to each, shall be granted to the said state, for the use of said state, the same to be selected by the General Assembly thereof, on or before the first day of January, 1840." 5 Id. 58.

To Colorado: "All salt springs within said state, not exceeding twelve in number, with six sections of land adjoining, and as contiguous as may be to each, shall be granted to said state for its use, the said land to be selected by the Governor of said state, within two years after the admission of the state." 18 Id. 476.

To Illinois: "All salt springs within such state, and the land reserved for the use of the same, shall be granted to the said state, for the use of the said state." 3 Id. 430.

To Indiana: "All salt springs within the said territory, and the land reserved for the use of the same, to-

gether with such other lands as may, by the President of the United States, be deemed necessary and proper for working the said salt springs, not exceeding, in the whole, the quantity contained in thirty-six entire sections, shall be granted to the said state, for the use of the people of the said state." 3 Id. 289.

To Iowa: "All salt springs within the state, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to the said state for its use; the same to be selected by the Legislature thereof, within one year after the admission of said state." 5 Id. 790.

To Kansas: "All salt springs, within said state, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said state for its use, the same to be selected by the Governor thereof within one year after the admission of said state." 12 Id. 127.

To Michigan: "All salt springs within the state, not exceeding twelve in number, with six sections of land adjoining or as contiguous as may be to each, shall be granted to the said state for its use, the same to be selected by the Legislature thereof, on or before the first of January, 1840." 5 Id. 60.

To Minnesota: "All salt springs within said state, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said state for its use; the same to be selected by the Governor thereof within one year after the admission of said state." 11 Id. 167.

To Missouri: "All salt springs, not exceeding twelve in number, with six sections of land adjoining to each, shall be granted to the said state for the use of said state, the same to be selected by the Legislature of the said state, on or before the first day of January, 1825." 3 Id. 547.

To Nebraska: "All salt springs within said state not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said state for its use, the said land to be selected by the Governor thereof, within one year after the admission of the state." 13 Id. 49.

To New Mexico: "65,000 acres of non-mineral, unappropriated and unoccupied public land, to be selected and located as hereinafter provided, together with all saline lands in said territory, are hereby granted to the said territory for the use of said university." 30 Id. 484.

To Ohio: "The six miles reservation, including the salt springs, commonly called the Scioto salt springs, the salt springs near the Muskingum River, and in the military tract, with the sections of land which include the same, shall be granted to the said state for the use of the people thereof." 2 Id. 173.

To Oregon: "All salt springs within said state, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said state for its use, the same to be selected by the Governor thereof within one year after the admission of said state." 11 Id. 384.

To Wisconsin: "All salt springs within said state, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to the state for its use; the same to be selected by the Legislature thereof, within one year after the admission of said state." 9 Id. 56.

No saline lands or salt springs were given to Arizona, California, Idaho, Florida, Kentucky, Louisiana, Maine, Mississippi, Montana, Nevada, North Dakota, South Dakota, Tennessee, Texas, Vermont, West Virginia, Washington and Wyoming.

XIII.

If it was the intention to give to the state merely the right to select saline lands as a part of the 110,000 acres, it seems strange that no limit to the time of making the selection was fixed. In granting saline springs to other states prior to this time, Congress was always careful to prescribe a period within which the selection must be exercised. An examination of the statutes mentioned in the preceding division will show the truth of this assertion.

If we once adopt the hypothesis that the saline lands are included in the 110,000 acres, then it cannot be disputed that the state has the right to select all of such lands. Until it formally declares its intention, what rights have citizens of the United States to acquire such lands under the mining laws of the United States? Can they by placer locations acquire possessory rights and remove and sell the salt? It would seem not. Until the

state formally renounces its interest in such lands or fully selects the 110,000 acres, no one, it would seem, can initiate even a possessory right by a placer location, much less mine and remove the salt. Suppose that within thirty days after Utah became a state and before a selection of any portion of the saline lands had been made, third parties had made placer locations of all such lands in the state. Could they thus deprive the state of the right of selecting these lands as a part of the 110,000 acres? Could they set at naught the mandate of Congress giving the state the right of selecting all saline lands within its boundaries? Even if the state had selected all but 10,000 of the 110,000 acres, and 50,000 acres of saline lands still remained, it would seem that no one could acquire even a possessory right to a single acre of these lands. So long as the right of selection remains, the state has the power to demand any saline lands whatsoever, regardless of any conditions. To say that placer locations made prior to a selection by the state are valid is to say that Congress did not give to the state the right of selecting all saline lands. And if the state may select any saline lands as a part of the 110,000 acres, this right cannot be defeated by a prior placer location, even though other lands of sufficient area remain to satisfy the grant.

If our conclusions based on the foregoing hypothesis are sound—which we submit is the case—it is remarkable that Congress fixed no time limit for the selection of such lands. No such limit being fixed, the state by selecting only 109,999 of the 110,000 acres can indefinitely prevent

third parties from acquiring title to any such lands; for so long as the right of selection remains, any saline lands may be selected, nor can anyone, as we have just seen, destroy this right by prior placer locations.

In every other grant of saline lands or springs where only a portion of the whole was given, Congress, as we have just seen, was always careful to provide for their selection within a given time. It doubtless realized that if no time limit was imposed, the state, by mere inaction, could indefinitely prevent third parties from acquiring such lands. But where all saline lands are given, there can be no object in requiring a selection to be made. Indeed, it is a contradiction in terms to speak of selection in such a case. That word presupposes that only a part of the whole is given; but where the whole is given there can, in the very nature of things, be no selection.

This is strikingly exemplified in the Acts of Congress mentioned in the preceding division. To Alabama, Illinois and Indiana all saline springs were given; to Ohio certain designated saline springs; to Arizona all saline lands in the territory. But note in those grants that not a word is said about selection. Note also the lack of any requirement that within a given time the state shall ascertain the location of the granted springs and lands. Note also that the state is required to do nothing to make the grant effective.

Now contrast with these the grants to Arkansas, Colorado, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Oregon and Wisconsin. In the grants to these states only a portion of the whole is given; and in each

instance Congress provides that the selection shall be made within a given time.

Selection, however, must not be confounded with identification or classification, which is something entirely different. Where the only thing to be done is to identify or classify land, there is no necessity of limiting the time. Inasmuch as the land laws of the United States require notice to be given of any application for patent, it would of course be incumbent on the state within the period of publication to assert its rights to the lands applied for if it disputes the applicant's right to patent. Its failure to do so would forever bar its right to the patented land.

When, therefore, we bear in mind that it has been the settled policy of Congress to fix a time limit for the selection of saline springs where only a part of the whole is given, and to fix no limit where all is given, does not the failure to fix any such limit in Utah's Enabling Act afford proof that Congress intended to give to this state all saline lands within its boundaries?

XIV.

There is, of course, no judicial authority upon the precise question under consideration, but in 1 Lindley on Mines, Secs. 513-515, the author has devoted a chapter to saline lands; and it is apparent that his construction of the clause under consideration is the same as that for which we contend. In a foot note at page 864, he says:

"On Utah's admission as a state, she received a

donation of all saline lands within the state. 28 Stats. at Large, p. 107, Sec. 8."

And again at page 866, he says:

"Henceforward, *except in such states as Utah, to which all salt lands therein have been previously ceded,* the general mining laws applicable to the discovery and location of placers apply."

XV.

We further contend that even if the saline lands were a part of the 110,000 acres, the state, even under that theory, is entitled to all the saline lands. As we have already seen, Congress gave to the state *all* saline lands. Nothing is said as to their selection or location, because the grant being of the whole and not of a part, there can in the very nature of things be no selection. To select presupposes the existence of a larger tract from which selection may be made. If it was the intention that the saline lands should form a part of the 110,000 acres, then it seems clear that Congress, intending that all the saline lands should pass to the state, confined the right of selection to a sufficient amount of other lands to make up 110,000 acres. In other words, it was first necessary for the legislature of the state and for the secretary of the interior to ascertain the total acreage of the saline lands. When this was done the right of selection was confined to selecting from the general unappropriated public domain an amount sufficient to make up 110,000 acres in all. If we once adopt the hypothesis that the saline lands are included in the 110,000 acres, then this construction is borne out by the language of the sentence under consid-

eration and the arrangement of its phrases. Congress simply points out how the 110,000 acres shall be selected —not how the saline lands shall be selected, its intention being to give *all* such lands. Having pointed out how the 110,000 acres shall be selected, it proceeds to dispose of an entirely different class of lands, viz., saline lands. The clause dealing with the saline lands follows the clause dealing with the selection of the 110,000 acres. Its language is, "and including *all* saline lands,"—not "and including *any* saline lands." All this shows that Congress intended to give all saline lands and a sufficient amount of other lands to make up 110,000 acres.

If this is true, it follows that no mistake on the part of the officers of the state and national governments charged with the duty of carrying these grants into execution can override the will of Congress. If it is true, as the pleadings admit, that the state has already selected the 110,000 acres, then we reply that such selection cannot affect the merits of this case; for if Congress intended to give all saline lands and to confine the right of selection to a sufficient amount of non-saline lands to make up 110,000 acres in all, no mistake on the part of such officers in carrying out the will of Congress can impair the state's title to the saline lands. Under the Act title passed the moment statehood was attained.

If, in answer to this, it be said that the saline lands may exceed 110,000 acres, then we reply that Congress probably thought that such lands fell short of that acreage; but even if it was mistaken in this, it nevertheless intended to give all the saline lands.

XVI.

Four years after the passage of the Act under consideration Congress passed an Act (30 U. S. Stat. at Large 484) making certain land grants to the Territory of New Mexico. Section 3 of this Act, which we quote in part below, is in almost the identical language of Section 8 of Utah's Enabling Act:

> "Sec. 3. That lands to the extent of two townships in quantity, authorized by the sixth section of the Act of July twenty-second, eighteen hundred and fifty-four, to be reserved for the establishment of a university in New Mexico, are hereby granted to the Territory of New Mexico for university purposes, to be held and used in accordance with the provisions in this section; and any portions of said lands that may not have been heretofore selected by said Territory may be selected now by said Territory. That in addition to the above, sixty-five thousand acres of non-mineral, unappropriated and unoccupied public land, to be selected and located as hereinafter provided, together with all saline lands in said Territory, are hereby granted to the said Territory for the use of said university."

The identity of the language in the two acts justifies the inference that the person who drew the act in favor of New Mexico had before him as a guide Utah's Enabling Act; but the phrase "and including all saline lands" has been changed to read, "together with all saline lands." The latter is more explicit and was no doubt inserted because of this, but the meaning of each is essentially the same; and with respect to the saline lands,

Congress no doubt intended to give to New Mexico just what it had given to Utah.

In a previous portion of this brief we advanced the argument that the phrase "and including all saline lands" is placed just where we would expect it to be placed if the intention was to give all those lands in addition to the 110,000 acres. The position in the New Mexico Act of the phrase "together with all saline lands in said Territory" bears out this assertion. In the case of New Mexico we have beyond all question a grant of all saline lands to that Territory; and in this connection note that the phrase granting such lands occupies precisely the same position as the similar phrase in Utah's Enabling Act.

XVII.

The plaintiff in error will probably make the same contention here that it made in the court below with respect to the word "and" in the phrase "and including all saline lands." It contended there that this word "must, as we take it, be stricken out as meaningless and serving only to obscure the meaning." (Transcript 15.)

But it is a familiar rule of statutory construction that effect must be given, if possible, to every word in a statute.

> "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, Sec. 2, it was said that 'a statute ought, upon the whole, to be so construed that,

> if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times." (Market Co. v. Hoffman, 101 U. S. 112, 115.)

"In the construction of a statute, every word is, if possible, to be given some effect. Nothing is to be stricken out if it can be avoided. It is not to be presumed that the legislature intended any part to be without meaning." (Allen v. Louisiana, 103 U. S. 80, 84.)

"It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language employed." (Montclair v. Ramsdell, 107 U. S. 147, 152.)

To same effect:

United States v. Fisher, 109 U. S. 143, 145;
Murphy v. Utter, 186 U. S. 95, 111.

XVIII.

Now, if it be true that Congress intended to grant all saline lands in addition to the 110,000 acres, we need not stop long to answer the argument of plaintiff in error that only *known* saline lands were intended. By whom and at what time, let us inquire, must the existence of these lands be known? If there now exists in some remote corner of the state a deposit covering only an acre of ground, unknown to any living man, although probably known at one time to some deceased settler in that region, is the State to be deprived of the land because, forsooth, the presence of salt at that place was unknown to Congress at the time the Enabling Act was passed? Or if within one year after Utah's admission to the

Union, someone riding on horseback in an unfrequented part of the country discovered the presence of salt by his horse's foot accidentally removing a layer of earth, is the State to be deprived of that land because no member of Congress was aware of its existence, or its presence never mentioned in a geological report?

Of course an entirely different question will arise in a case where an agricultural claimant, for example, receives a patent to land which afterwards turns out to be chiefly valuable for salt. If the claimant acted in good faith, he would probably be protected. But we need not discuss what the result would be, because in this case the lands were known to be saline *before any rights were initiated.* An effort was made by placer locations to acquire the lands because they were saline and known to be such.

See Barden v. Northern Pacific R. Co., 154 U. S. 288.

Furthermore, (1) if Congress had intended to give only known saline lands it would have been a very easy matter to have said so; and (2) to insert this word in the phrase under consideration violates a well known rule of statutory construction.

XIX.

The rule of construction invoked by the plaintiff in error, that a public grant is construed strictly against the grantee, can come into play only where there is a real and substantial doubt as to what Congress intends. Where the meaning of Congress is fairly and reasonably

apparent, the grant cannot be defeated by invoking the rule that a legislative grant is construed strictly against the grantee merely because a single word is sometimes used in such a sense that considering it alone, a doubt may arise as to the sense in which it was used, when an examination of the whole context fairly shows in what sense it was used by the legislative body. "It is undoubtedly . . . the well settled rule of this court that public grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by fair implication." (U. S. v. D. & R. G. R. Co., 150 U. S. 1, 14.) "In coming to this conclusion, I have not overlooked the rule that grants from states to corporations of such exclusive privileges are to be construed most strongly against the grantees. But this rule, like its converse, *fortius contra proferentem,* which applies to private grants, is the last to be resorted to, and never to be relied upon, but when all other rules of exposition fail." (Curtis, J., in Richmond, etc. R. Co. v. Louisa R. Co., 13 How. 71, 86.)

XX.

We deny the rule to be that in the construction of an Enabling Act the land grants therein made are to receive at the hands of this court the strict construction which is followed with respect to legislative grants to railroad companies or to states to aid in the construction of railroads. An Enabling Act stands on an altogether different footing. It is a compact between two sovereignties.

In Section 3 of the Act under consideration it is provided that the convention called under its provisions to formulate a constitution "shall provide by ordinance irrevocable without the consent of the United States and the people of said state," that the people of Utah "do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; . . . that no taxes shall be imposed by the state on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use; . . . that provision shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of said state and free from sectarian control."

With all of these provisions the people of Utah complied. See Article III of the State Constitution. By this article the state forever disclaimed all right and title to the unappropriated public lands and to all lands owned or held by any Indian or Indian tribes, and agreed never to impose any taxes on lands or property belonging to the United States; and in the following language further obligated itself to establish and maintain a system of public schools: "The Legislature shall make laws for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and be free from sectarian control." In Article X is it further provided that the public school system shall include kindergarten schools, common schools, high

schools, an agricultural college, a university, and such other schools as the Legislature may establish.

The state having thus obligated itself to establish and perpetually maintain a system of public schools—an obligation which it can never escape without the consent of the United States—a grant of lands by Congress to enable the state to perform in part this obligation is not to be construed in the light of the rules of strict construction applicable to ordinary land grants where no contractual relation is involved.

The following are the principal cases which establish the rule that a legislative grant of public lands is to be construed in favor of the Government and against the grantee:

Dubuque & P. R. Co. v. Litchfield, 23 How. 66;
Leavenworth, etc. R. Co. v. U. S., 92 U. S. 733;
Barden v. Northern P. R. Co., 154 U. S. 321;
Sioux City, etc. R. Co. v. United States, 159 U. S. 349;
U. S. v. Oregon, etc. R. Co., 164 U. S. 539.

But these are all cases where the grant was to a railroad company, or to a state in aid of the construction of a railroad, or to a state for the purpose of internal improvement.

The following cases involved the construction of land grants as contained, with two exceptions, in the Enabling Acts of several of the states; and in *no instance* did this

court invoke for its guidance the rule of construction mentioned in the preceding cases or allude to it in any way:

Ham v. Missouri, 18 How. 126;
Cooper v. Roberts, 18 How. 173;
Morton v. Nebraska, 21 Wall. 660;
Heydenfeldt v. Mining Co., 93 U. S. 634;
Beecher v. Wetherby, 95 U. S. 517;
Mining Co. v. Mining Co., 102 U. S. 167;
Mullan v. U. S., 118 U. S. 271;
Missouri, etc. R. Co. v. Roberts, 152 U. S. 114;
Hitchcock v. Minnesota, 185 U. S. 373;
Johnson v. Washington, 190 U. S. 179.

The two exceptions above spoken of—Mining Co. v. Mining Co., *supra,* and Missouri, etc. R. Co. v. Roberts, *supra*—were cases where land grants for public school purposes were made after California and Kansas had been admitted to the Union; and even here this rule of construction was not adverted to.

The reason for this rule of strict construction as declared by this court in two cases is:

> "The reason of the above rule is obvious—parties seeking grants for private purposes usually draw the bill making them. If they do not make the language sufficiently explicit and clear to pass everything that is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking, by ingenious interpretation and insinuation, that which cannot be obtained by plain and express terms." (Dubuque etc. R. Co. v. Litchfield, 23 How. 66, 88.)

"As a reason for this rule it is often stated that such

> acts are usually drawn by interested parties; and they are presumed to claim all they are entitled to . . . The rule is a wise one; it serves to defeat any purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies." (Slidell v. Grandjean, 111 U. S. 412, 437.)

It is hardly necessary to say that this reason is wholly inapplicable to the Act now under consideration. Furthermore, this court has recognized a distinction. In Minnesota v. Hitchcock, 185 U. S. 373, 401, it is said:

> "We come finally to a consideration of the policy of the Government both in respect to schools and to Indians. It is undoubtedly true that such policy from the beginning has been liberal in the appropriation of lands for school purposes. . . It is not to be supposed that Congress intended any departure from this policy in its legislation in respect to lands within Minnesota, and the courts are justified in any fair construction of such legislation as will secure to the state its full quota of lands for aid in the development of its public school system. . . The interests of public schools have always been considered paramount to those of railroad companies in grants made to aid in their construction. The one speaks for intellectual; the other for material development."

The Enabling Act being a compact between the United States and the State of Utah, it should receive the same construction as an ordinary contract.

Tennessee v. Whitworth, 117 U. S. 129, 137.

Where a state is the grantee a more liberal rule of construction prevails.

Indiana v. Milk, 11 Fed. 389.

XXI.

To summarize our brief, we contend and maintain that Congress intended to grant all saline lands in addition to the 110,000 acres, because:

1. The participle "including" refers, not to the 110,000 acres, but to the phrase "in addition to the above." Congress used an elliptical sentence. If it had written its meaning out in full the sentence would read: "That in addition to the above, 110,000 acres of land, to be selected and located as provided in the foregoing section of this act, and including *in what is additional to the two townships* all saline lands in said state, are hereby granted," etc.

2. We have judicial authority to the effect that Congress frequently uses the word "including" in the sense of "also," and we have cited numerous instances in which it is so used.

3. The phrase, "and including all saline lands in said state," is situated at the precise point where grammatical usage requires it to be situated if Congress intended to grant the saline lands in addition to the 110,000 acres. It is awkwardly and ungrammatically placed if this was not the intention.

4. To say that Congress intended to include these lands in the 110,000 acres, is to say that Congress was unaware of elementary rules of grammar, for the phrase could not have been placed in a more awkward and ungrammatical position.

5. The grant of 110,000 acres was a grant of an undesignated part of the public domain. To make the grant

effective the land had to be selected and located. After making a gift of the 110,000 acres, Congress at once points out how the land shall be selected.

6. The grant of all saline lands was a grant of the whole. Selection and location were therefore unnecessary. If it had been the intention to give to the state the right to select these lands as a part of the 110,000 acres, the phrase giving this right would have been inserted before the clause which points out the manner in which selection and location shall be made.

7. The use of the adjective "all" indicates that it was the intention to give these lands in addition to the 110,000 acres. If, as the plaintiff in error maintains, the state was given the right to select these lands as a part of the 110,000 acres, the adjective "any" would be the correct word to use. This adjective is usually associated with the idea of selection. The adjective "all" negatives the idea of selection.

8. If Congress had intended to include these lands in the 110,000 acres, it would in all probability have employed the adverb "therein." The phrase, "and including all saline lands in said state," is so far removed from the phrase, "110,000 acres of land," that this very remoteness would have suggested to Congress the propriety of using this adverb.

9. The use of the conjunction "and" in the phrase "and including all saline lands" indicates that Congress intended to grant something in addition to the 110,000 acres. The plaintiff in error rejects this word as meaningless. The rules of statutory construction require that

if possible a construction shall be adopted which will give effect to every word. The plaintiff in error ignores this rule. The construction for which we contend is in harmony with it.

10. If it was the intention to include the saline lands in the 110,000 acres, the use of the conjunction "and" to introduce the phrase, "including all saline lands in said state," would be in flagrant disregard of the simplest rules of grammar.

11. It is not improbable that Congress thought that the saline lands in the state might exceed 110,000 acres. Especially is this true when we bear in mind that it gave to Kansas, Colorado, Wisconsin, Nebraska, Iowa and Minnesota 46,080 acres each in connection with salt springs for their preservation, and that the physical conditions in Utah are more favorable to the presence of salt than in any of those states. It is, therefore, unlikely that Congress would use words indicating that all saline lands are given and yet limit the grant to 110,000 acres.

12. If the saline lands are included in the 110,000 acres, then these italicized words were wholly unnecessary: "and including all saline lands *in said state.*" It was tautology to insert them. Their presence violates the rules of grammar. But if it was the intention to grant these lands in addition to the 110,000 acres, the italicized words are properly inserted.

13. Section 13 of the Enabling Act recognizes a distinction between lands granted in quantity and in kind. The saline lands are the only lands granted in kind. The construction urged by plaintiff in error ignores this dis-

tinction. Under its theory, the grant in question was a grant in quantity, not in kind, and no lands at all were granted in kind.

14. With respect to the lands granted in quantity or as indemnity Congress took the precaution in Section 13 to say that they should be selected from the unappropriated public domain *within the state.* It was unnecessary to take such a precaution with respect to lands granted in kind. The only lands so granted were saline lands; and in granting them, Congress took the precaution, in the very sentence containing the grant, to say: "all saline lands *in said state.*"

15. If the saline lands are included in the 110,000 acres, then this is the first instance where Congress ever gave the right of selecting such lands in satisfaction *pro tanto* of a larger land grant. Prior to this Congress always dealt *separately* with saline springs and the ground contiguous to them. In no instance were such lands or springs included in a larger grant.

16. In granting *all* saline springs and lands to Alabama, Illinois, Indiana and New Mexico, Congress made no provision for their selection or identification. In granting to Arkansas, Colorado, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Oregon and Wisconsin, *twelve* salt springs each, provision was made for their selection *within a given time.* In Utah's Enabling Act no provision is to be found requiring the saline lands to be selected within a given time. This affords proof that Congress intended to give these lands in addition to the 110,000 acres.

17. We have no direct judicial authority on this matter, but the author of Lindley on Mines, after an impartial investigation, reached the conclusion for which we contend.

18. Four years after Utah's Enabling Act was passed, Congress gave to New Mexico all saline lands in that territory for the benefit of its university. From the almost identical language of the two acts, it is apparent that Congress intended to treat Utah and New Mexico alike.

19. The plaintiff in error tries to read into the phrase under consideration this italicized word: "and including all *known* saline lands." To this three answers are open: (1) if Congress had so intended it would have been an easy matter to have said so; (2) to insert this word violates a rule of statutory construction; (3) the lands in question were known salines before any rights were initiated by placer locations.

20. Our position is that Congress used the participle "including" in its proper sense as defined in the dictionaries, or in the sense of "also." We do not reject it as meaningless. On the contrary we explain its meaning. The plaintiff in error, however, rejects as meaningless the conjunction "and." This ignores the rule of statutory construction that if possible every word must be given effect. Our position pays full heed to this rule.

21. If it be said that the saline lands are included in the 110,000 acres, then we reply that Congress intended to give to the state all saline lands, and confined the right of selection to enough non-saline lands to make up 110,-

000 acres. If this number has been selected, as the pleadings admit, this cannot impair the state's title, for no mistake on the part of the selecting officials can override the mandate of Congress that all saline lands shall pass to the state.

22. The rule often declared by this court that a legislative land grant is to be construed in favor of the government rather than in favor of the grantee, and that nothing passes unless given in clear and explicit terms or by necessary implication, does not weaken our position. Even though this rule be followed in all its strictness, the correctness of our interpretation of the phrase in question remains unshaken.

23. But in point of law this rule of construction is inapplicable to the Act under consideration. This court is called upon to construe, not an ordinary legislative land grant, but a compact between two sovereignties. There is no rule that a compact of this sort shall, in case of doubt, be construed in a light favorable to the United States and against the state. Indeed the reason for the rule as expounded by this court is wholly foreign to an Enabling Act.

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